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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LOWE EXCAVATING CO., PETITIONER

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After nineteen years of litigation since February 1988, a bench trial and three appeals, Petitioner Lowe proved that Respondent Local 150 committed intentional and malicious libel in reckless disregard of the truth against it. The trial judge made specific written findings that in light of the protracted litigation caused by the Respondent to occur, the intentional conduct that was found, the attorneys' fees that had to be expended, the need to deter the Respondent and others from engaging in the same conduct in the future, and in light of small actual damages awarded, a punitive damages award of $525,000.00 was necessary to deter Respondent and others. The Supreme Court of Illinois, with dissent, reduced the punitive damages award to an 11-1 ratio of $50,000.00.

The questions presented are:

1. What is the appropriate test to prevent the abuse of the constitutional due process defense of "grossly excessive" punitive damages, where a claim that an amount is too great is based upon only the ratio to actual damages and not to a defendant's net worth, the affect of the punitive award on defendant's business, and whether the amount would deter others from engaging in protracted litigation and commission of the tort.

2. Whether in reviewing a trial judge's award of punitive damages for malicious libel, the due process clause of the United States Constitution creates a review standard for the appellate court to determine whether intentional and malicious conduct found was "more egregious" or less egregious than in other cases under the Court's rulings in *State Farm* and *Cooper Industries*.

3. Whether a trial judge's award of punitive damages based on specific findings of fact after a state court bench trial is subject to the same *de novo* standard of review as awards made by juries under *Cooper Industries* and *Phillip Morris* or an abuse of discretion standard of review for excessive awards as in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 434-35, 436 (1996).

4. Whether deterrence is the overriding objective by the Illinois Supreme Court's failure to consider Lowe's cross-appeal in weighing the amount of punitive damages to award such that the Supreme Court of Illinois failed to consider Lowe's cross-appeal to find an appropriate remedy.

5. Whether in balancing the necessary deterrence for malicious defamation resulting in small compensatory damages, the Fourteenth Amendment deprivation is not breached unless a punitive damage award exceeds 10% if the net worth of the Defendant.

6. Whether punitive damages for reputational injury requires a different standard of review under the Fourteenth Amendment then do cases of physical injury.

RULE 29.6 STATEMENT

Petitioner Lowe Excavating Co. ("Lowe") is a closely-held, non-public corporation owned by Marshall Lowe. Lowe has no parent companies, public subsidiaries or affiliates. No stock is owned by any public corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Lowe Excavating Co. ("Lowe"), respectfully petitions for a Writ of Certiorari to review the opinion and judgment of the Supreme Court of Illinois. The state court has decided an important federal question predicated exclusively on a Fourteenth Amendment deprivation of due process argument in a way that conflicts with the decisions of this Court, federal appellate courts, and there are compelling reasons for exercising supervisory review.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported at 225 Ill.2d 456, 870 N.E.2d 303 (Ill. 2006) and is reprinted in the attached appendix at 1a. The opinion of the Appellate Court of Illinois, Second Judicial District is reported at 358 Ill.App.3d 344, 832 N.E.2d 495 (2d Dist. 2005) is reproduced at48a.

Two previous appeals of this case are reported as *Lowe Excavating Co. v. International Union of Operating Engrs., Local 150, ("Lowe I),"* 180 Ill. App. 3d 39, 535 N.E.2d 1065 (2d Dist. 1989), *Ill. app. denied,* 126 Ill. 2d 560, 541 N.E.2d 1107 (1989), *cert. denied, 493 U.S. 975 (1989), further proceedings, Lowe Excavating Co. v. International Union of Operating Engrs., Local 150, ("Lowe II"),* 327 Ill.App. 3d 711, 765 N.E.2d 21 (2d Dist. 2002), *Ill. app. denied,* 199 Ill.2d 557, 775 N.E.2d 3 (2002), *cert. denied,* 537 U.S. 1028 (2002).

The opinions of the Circuit Court of McHenry County, Illinois, are unreported. The relevant opinions

and Orders of that court are reproduced in the appendix at pages 67a, and 67a.[1]

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on November 30, 2007. A Petition for Rehearing and Reconsideration was timely filed and was denied on May 29, 2007. App 47a.

Pursuant to Supreme Court Rules 13.5 and 22, an Application for Extension of Time to File its Petition was filed by Lowe with Justice Stevens on August 16, 2007. On August 21, 2007, Petitioner was notified that Justice Stevens had granted the Application for Extension of Time to October 26, 2007. App. No. 07A13-9.

This Court has jurisdiction to review the judgment of that court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 7 of the Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

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[1] "a" references are to the accompanying Appendix hereto. "Tr. Vol." references are to the volumes of the trial court transcript.

Amendment 8 of the Constitution, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment 14 Section 1 of the Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Background Facts. This case's long history arises out of Respondent's desire to deny its liability for publication of malicious libel of Lowe. On February 17, 1988, Lowe filed a Verified Complaint for Temporary Restraining Order, Preliminary and Permanent Injunction and for Damages against International Union of Operating Engineers, Local 150 ("Local 150") in the Circuit Court of McHenry County, Illinois.

In late 1987, the developer FAMCO secured a building permit for a nursing home at Canterbury Place in McHenry Country, Illinois, which was called

Ballashire Hall. R-870. Ballashire Hall was a federally funded construction project of the federal Housing and Urban Development Agency ("HUD"). R-871.

Lowe had worked for FAMCO for approximately ten years when the Ballashire Hall project arose.

HUD contracts require employers on financed projects to pay employees the prevailing area wage in accordance with the Davis-Bacon Act, 40 U.S.C. §§ 276a-276a-5, implementing regulations at 29 C.F.R. §5 *et seq.*, and specific prevailing area wages and benefits established by the United States Secretary of Labor.

Local 150 attempted to secure the organization of Lowe through Lowe's voluntary access to employees in the Fall of 1987. At trial, Business Agent Colin Darling testified that his only evidence that Lowe was not paying prevailing wages and benefits in 1988 "was just hearsay from a couple of his employees" he obtained in the summer of 1987. R-555. Lowe also showed the union its payroll information in December 1987. R-563

On Monday February 15, 1988, the Union began picketing Lowe at Ballashire Hall with signs stating: "LOWE EXCAVATING DOES NOT PAY THE PREVAILING WAGES AND ECONOMIC BENEFITS FOR OPERATING ENGINEERS WHICH ARE STANDARD IN THIS AREA." C-741.

Soon after the signs were posted, Petitioner Darling was approached by Mr. Bradley Brei, President of FAMCO at the entrance to the project. Mr. Brei told Mr. Darling "that I had already filed certified payrolls

with HUD that Lowe Excavating was paying prevailing wage rates and I could not understand on what the basis was that he was there or why the pickets were there." R-879 ll.10-15. Brei also asked Darling "how can you picket on a basis that he's not paying prevailing wage rates when they've been certified." R-907 ll.15-18. Mr. Darling did not respond to Mr. Brei's question. R-879. Instead, Mr. Darling's response to Brei was for Brei to read the sign. R-567.

As a result of the conversation, Mr. Brei called Marshall Lowe and asked him what was happening, because the union was "saying you're not paying prevailing wages." R-888. Mr. Brei ordered Lowe to remove his people from the site. R-882-83.

The National Labor Relations Board certified the Congress of Industrial Unions as the representative of Lowe's employees on March 30, 1988. Local 150 did not participate in the election.

Lowe was called back to the Ballashire Hall project in the summer of 1988 by FAMCO to finish grading. The Union reestablished pickets at Ballashire Hall in September 1988. R-591.

Brei's reaction to the renewed statements was "frustration, disgust with Local 150, frustration with Marshall that he didn't get his house in order or whatever had to be done in order to continue to work." R-895. Mr. Lowe again told Mr. Brei in September 1988 that his company was indeed paying the prevailing wage and "health and welfare that was beyond the prevailing wage." R-1210 ll.9-12. However, Brei was fed up, R-1210, 1234-35, and "visibly upset," R-1237.

Brei was to "the breaking point," because he was signing the HUD certifications. R-1235-36.

Brei removed Lowe from Ballashire Hall again. R-895. Brei obtained a union contractor to take over Lowe's work. R-895, 921 ll.18-20.

Lowe's expert witness Frank Stampler, CPA, of the CPA firm Frank W. Stampler & Company, audited Lowe's wages and benefits with two other CPAs for the period January 13, 1988, to February 16, 1988, at Ballashire Hall, and for two other periods in 1988. From January 1 to May 20, 1988, Mr. Stampler's audit shows that all Lowe's operators received over the prevailing rate for this period. R-1097 ll.16-22.

Lowe did not work with Brei or FAMCO again for another six years. R-1240.

The trial court initially granted Lowe's motion for a temporary restraining order on October 11, 1988, prohibiting the appellees from "picketing or otherwise disseminating the fact that Lowe is non-union." C-210. Simultaneously, the trial court denied "Plaintiff's request for preliminary injunctive relief from alleged picketing, with knowingly false placards relating to area standards, in reckless disregard for the truth is denied, based on federal preemption grounds."

2. Previous Appeals. Lowe filed an interlocutory appeal. In *Lowe I*, the Appellate Court on March 3, 1989, reversed the trial court's decision that the tort of libel was preempted by federal labor law and remanded the case for hearing.

A bench trial was held in April and June 2000, before trial Judge Michael Sullivan. Lowe's damage was found to be $4,680.00. On February 22, 2004, the Appellate Court of Illinois found that Local 150 had published malicious libel about Lowe in reckless disregard for the truth. *Lowe II*, 765 N.E.2d at 32.

In addition, the Illinois Appellate Court in *Lowe II* found error in the trial court's denial of punitive damages derived from its refusal to hear evidence concerning the amount of attorney's fees expended by Lowe to present its case because "attorney fees may be included in the amount of the award of punitive damages," but "cannot be awarded as a separate entity distinct from punitive damages." *Id.* at 34. The Appellate Court directed on remand that "the trial court should consider this evidence if it decided to award punitive damages." *Id.*

3. Punitive Damages Proceedings.

On remand, Lowe filed a Motion for Punitive Damages to which Local 150 replied and argued in part that such an award would be unconstitutional. CC001451.

The trial court issued its Order on Punitive Damages on January 12, 2004. App 67a. It found that the law of the case rulings from the Appellate Court included: 1) that the Union's statements "against the Plaintiff were defamatory;" 2) that the statements "against the Plaintiff were false;" and 3) that the "statements in issue were published by the Defendant against the Plaintiff with actual malice." 69a. The attorneys' fees expended to prevail at that point had been over $500,000.00.

Exercising his discretion in the award of punitive damages, the trial judge stated that "this Court is not awarding attorney's fees, but is considering Plaintiff's attorney's fees as a factor in the assessing of punitive damages." 73a ¶9. Because of the small amount of actual damages awarded, the trial court found that the "defendant's actions" caused Lowe "to be involved in protracted litigation and expend a substantial amount for attorney's fees," and that Local 150 needed to be deterred "f om engaging in the same conduct in the future." 73a ¶11. The trial court awarded $325,000.00 to Lowe in punitive damages. *Id.*

Lowe filed a Motion for Partial Reconsideration of the Order. On February 24, 2004, the trial court heard argument on Lowe's Motion for Partial Reconsideration and increased the punitive damages award to $525,000.00. App. 76a.

On appeal, the Illinois Appellate Court affirmed the trial court's decision 48a, and basis for an award of punitive damages under Illinois and federal law. 41a. However it reduced the punitive damages award to $325,000.00 on the grounds that a 75-1 award rather than a 100-1 ratio was constitutionally permissible. 65a.

On leave to appeal granted, the Supreme Court of Illinois affirmed that the $525,000.00 awarded by the trial judge was in accord with Illinois common law on punitive damages. 10a. The majority of that Court found, however, that the due process clause required a reduction in the award to an 11-1 ratio of $50,000.00. 39a.

It agreed the "Union acted with intentional malice," 30a, yet discredited the Appellate Court's conclusion that Lowe was financially vulnerable as a small business, 17a. and the Union had falsely picketed other persons, as well. 27a.

Noting that providing an incentive for attorneys to take cases where damages may be small and that attorneys' fees may be taken into consideration as a measure of punitive damages, the Court decided that despite intentional and reprehensible conduct at hand, "a double-digit ratio of approximately 11 to 1, would be reasonable and constitutional." 39a. This was because "our analysis demonstrates, the Union's conduct was minimally reprehensible, and the appellate court's award of punitive damages far exceeded awards given in other cases where the conduct exhibited was much more egregious." 39a.

Justice Garman's dissented. 41a. She found the appellate court's analysis of the *State Farm* factors to be correct and that the $50,000.00 approved by the majority would be,

> inadequate to give a victim an incentive to sue in the first place, and thus insufficient to punish and deter a defendant. Additionally, this case provides a strong example of a situation where, without a significant punitive award, extreme litigation costs could make it difficult for a plaintiff to find a lawyer willing to fight for such modest stakes.

38a.

Therefore, should would have affirmed the decision of the Appellate Court and awarded $325,000.00 which "would accomplish" the tasks of deterrence and punishment of "overly and aggressive defendants" under *Gore* and *State Farm.* 46a.

REASONS FOR GRANTING THE PETITION

A. The Illinois Supreme Court's Ruling That the Due Process Clause Enables an Appellate Court to Reject a Trial Judge's Decision on Punitive Damages in Small Damage Cases Due to an Imbalance in the Ratio Creates Conflicts with the Decisions in *Gore*, *Cooper Industries*, *State Farm*, and *Phillip Morris*

After being compelled to pursue its claim of defamation through a bench trial and three briefed appeals over nineteen years and now is in its tenth appellate briefing, this case demonstrates that punitive damages must not be subject to a rigid ratio scrutiny by appellate courts where small damages are awarded.

The Illinois Supreme Court's Opinion failed to properly apply the "grossly excessive" standard of review requirement from the Due Process Clause by not only failing to employ the two appropriate considerations of deterrence and punishment on findings made by the trial court, but also failing to recognize that in this small damage case the defendant pursued an aggressive litigation strategy designed to defeat the plaintiff's claim, and therefore strict adherence to a ratio is not required and a higher ratio is necessary to deter and punish the behavior. That Court trumped this Court's case law and imposed a

federal standard of review rejected by this Court and other courts.

The guideposts were correctly applied by the trial judge and appellate court. When the matter reached the Supreme Court of Illinois, that Court further rejected the Seventh Circuits's analysis of the constitutional case law that compensatory damages will not "do the trick" where damages are too slight to give a victim an incentive to sue and would not deter and punish the wrongdoer. *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003). *See BMW of North America v. Gore*, 517 U.S. 559, 582 (1996) (ratio inapplicable where "injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.")

It is "only when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *Gore*, 517 U.S. at 568. As restated by this Court in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 416 (2003), arbitrariness is the trigger: "whether the punitive damages awarded violate the due process clause of the fourteenth amendment, which prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."

In rejecting the trial court's and the Illinois Appellate Court's rulings that their awards were not arbitrary, and that even "a punitive damages award of $325,000, at a ratio of approximately 75-1, is unconstitutionally excessive in light of the Union's

conduct in the instant case" and that "the amount of $50,000, for a double-digit ratio of approximately 11 to 1, would be reasonable and constitutional," 39a, no case or citation to this Court's decisions or the Fourteenth Amendment was employed. No other foundation in this Court's principles of law of deterrence and punishment to the award it set were applied.

The proper constitutional standard to apply is clearly whether the punitive damages award relates to the unlawful conduct and the legitimate interest in deterrence. *Gore*, 517 U.S. at, 568; *Cooper Ind., Inc. v. Letterman Tool Gp., Inc.*, 532 U.S. 424, 434 (2001); *State Farm*, 538 U.S. at 417 (2003).

Yet, the Illinois Supreme Court went further to create conflict with the constitutional tests employed by United States Court of Appeals for the Seventh Circuit which had previously employed this Court's due process tests in small damage cases where the harm was dignitary or hard to detect as set forth above in *Mathias* and discussed further, *infra*. The Illinois Supreme Court has chosen to apply the guideposts and ratios in all cases.

This choice has created a conflict with the highest court of a State and the federal appellate court with jurisdiction over that state. This is a compelling reason to grant review. *Baldwin v. Alabama*, 472 U.S. 372, 374 (1985). Maintenance of this conflict in constitutional considerations in Illinois and neighboring States will lead to forum shopping and different results based solely upon whether a case is removable to federal court.

Yet, until the matter reached the Supreme Court of Illinois, the considerations set forth in *Gore* and *State Farm* were applied by the trial judge and the appellate court. The written opinions of both those courts precisely explain how the awards were related to the gravity of the offense of injury and deter costly and protracted litigation by Local 150 and others by the possibility that attorneys' fees can be considered as a measure of punitive damages.

The concurring opinion of Justices Breyer, O'Connor and Souter in *BMW v. Gore*, 517 U.S. at 586-87, explain that "Members of this Court have generally thought, however, that if "fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity."

What the Supreme Court of Illinois has done below is interpret the decisions of this Court as an omnibus license to police punitive damage awards based on facts *not* found by the trial court, but on the basis of conduct not comparable to what occurred in the case.

In *Phillip Morris USA v. Williams*, 127 S. Ct. 1057, 1062 (2007), this Court had before it a case where a $79.5 million award was considered by the state court as not "grossly excessive" under *BMW v. Gore* and *State Farm*. This Court chose not to decide the question. Rather, the Court found that the Oregon Supreme Court had "applied the wrong constitutional standard" on considering reprehensibility. It remanded the case for consideration of whether the amount awarded was arbitrary because evidence was introduced to the jury of harms inflicted on other third

parties. 127 S. Ct. at 1064. The Court indicated that the risk of arbitrariness is ameliorated when state court procedures are in place to prevent confusion from arising. 127 S. Ct. at 1065.

These "procedures" are the same ones used by courts in Illinois under its common law, utilized by the trial judge and Appellate Court as part of their standard of review:

- Rulings of a trial court after a bench trial will not be set aside unless the holding is manifestly against the weight of the evidence. Schulenburg v. Signatrol, Inc., 37 Ill.2d 352, 356 (1967).
- A punitive damages award will not be overturned as being excessive unless it is clear that it is the result of "passion, partiality, or corruption." Ford v. Herman, 316 Ill. App.3d 726, 734, 737 N.E.2d 332, 339 (5th Dist. 2000).
- The appellate court will not substitute its judgment as to the credibility and weight to be given to witnesses for that of the trial court. Stanton v. Republic Bank, 144 Ill. 472, 479, 581 N.E.2d. 678, 681 (1991).
- The findings of the trial court in a libel case that a punitive damage award is appropriate in a given situation based on whether the award is necessary to bring the matter to the defendant's attention to deter it and others, based on observance of its demeanor, failure to investigate, efforts to exculpate the effects of its conduct, and reckless disregard of a plaintiff's reputation, will not be overturned. *Gibson v. Phillip Morris, Inc.*, 292 Ill. App.3d 267, 280, 685 N.E.2d 638, 648 (5th Dist. 1997).

This Court has called on the States to implement and apply such procedures.

The State of Alabama, in *BMW v, Gore*, however, utilized "vague and open ended" procedures in its punitive damages assessment "to the point where they risk arbitrary results." *Id.* at 588 (concurrence). That court relied upon "a 'comparative analysis' that considered Alabama cases, "along with cases from other jurisdictions, involving the sale of an automobile where the seller misrepresented the condition of the vehicle and the jury awarded punitive damages to the purchaser." 517 U.S. at 567. This Court expressly showed that Alabama erred by "using its power" to consider circumstances where it "had no impact on Alabama or its residents." *Id.* at 572-73.

In the instant case, the Illinois Supreme Court looked at two variables to ascertain the constitutionality of the punitive damages award: "Excessiveness," 12a, and "Fairness," 34a. The latter factor it did not apply because the issue was waived by the Union. 34a.

It was clearly the Illinois Supreme Court's view that the three guideposts discussed in *BMW v. Gore* and *State Farm v. Campbell* were to be considered in its evaluation of the award to Lowe: reprehensibility, disparity between actual and potential harm, and punitive damages awarded in comparable cases. 14a.

That Court dismissed the Appellate Court's consideration of the third reprehensibility factor that Lowe was a small business and was financially vulnerable, because it saw the record "devoid of

evidence" although Lowe had only 16 employees at the time and of the libelous publications and it was not clear to that Court that Lowe had lost other business. 17a

The Court further apprehended that the fourth reprehensibility factor, repetitive character of the act, was limited in nature against Lowe and other persons, but repetitive against Lowe nonetheless. 20.[2]

The testimony of the trial judge who had handled the case since its inception in 1988 and tried the case and issued the punitive damages award is an important consideration when documents and testimony form the record assessed by the trial judge in rendering his opinion. He found the Union's conduct was not only repetitive, but also that there was a need "to deter the Defendant and others from similar conduct in the future." 71a ¶6. The trial court was apprised of all the evidence of Local 150's recidivist conduct through trial in 2000 and found that "additional harm to the Plaintiff [was] caused by the Defendant's actions which caused the Plaintiff to be involved in years of protracted litigation...." 73a ¶11.

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[2] Evidence of libelous conduct by Local 150 against Lowe and other persons is in the record at C001444-48, which the trial judge considered, showing publication type of libel with the same signs against Kinney Contractors, Inc. on a different federal prevailing wage project. Local 150 representatives further defamed Lowe to other companies at other locations in Illinois, such as Lowe was a "non-union" company when the Union knew Lowe's employees were represented by a NLRB certified labor union. R000954 ll.3-4; R000770 ll.11-19.

Judge Sullivan heard the emotional testimony of Bradley Brei, President of FAMCO, that the second time the union picketed Ballashire Hall caused him to lose all confidence and faith in Lowe's ability to do prevailing wage work. The Union's injury to the ten-year business relationship of a major customer of Lowe was indeed part of Judge Sullivan's assessment—one which the Illinois Supreme Court could not easily evaluate.

The consequences inflicted on Lowe by Local 150 surpassed the damages on the single February 1988 event at Ballashire Hall, continued in time and distribution to involve other parties. The affirmed finding in this case is that Local 150 engaged in deliberate false publications directed at Lowe. Unlike the activities of BMW where "the record in this case discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive," *BMW v. Gore*, 517 U.S. at 579, Local 150 engaged in acts deliberately intended to conceal their purposes (*i.e.*, that it would not consider any employer evidence of wages and benefits without an audit) and published statements in reckless disregard for the truth about Lowe to third-parties.

In *BMW v. Gore*, the Court reiterated that cases involving "trickery and deceit" were more reprehensible then negligence cases, 517 U.S. at 576, and where the record discloses "deliberate false statements," the deliberate false statement "exhibit...the circumstances ordinarily associated with egregiously improper conduct which leads to the "high degree of culpability" warranting "substantial punitive damages" *Id.* at 580.

Contrary to the Illinois Court's claim that "[t]here is no evidence of a similar pattern of misconduct in this case," 27a, the Kinney affidavit shows that in 1999 just months before trial, the Union was still employing the same reckless procedures, signs, and publications against other persons in Illinois.

Next the Illinois Court agreed that the union's intentional malice "can be characterized as reprehensible." 24a. This led to that Court' s consideration of the difference between the harm to Lowe and the punitive damages awarded.

BMW v. Gore and State *Farm* have two methodologies. First, is a due process consideration when an award of punitive damages runs beyond single digit multipliers. But even there, this Court in both cases ruled that "there are no rigid benchmarks that a punitive damages award may not pass."*State Farm*, 538 U.S. at 425; *BMW*, 517 U.S. at 582 (rejecting "the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award).

Second, is the small award circumstance explained in *BMW v. Gore* and in *State Farm*:

> Nonetheless, because *there are no rigid benchmarks that a punitive damages* award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted ***in only a small amount of economic damages***." Ibid.; see also ibid (positing that a higher ratio *might* be necessary

> where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine")....The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

State Farm, 538 U.S. at 425 (emphasis added), *BMW v. Gore*, 517 U.S. at 582.

While the trial court clearly relied on this factor, there is now clearly a critical dispute represented by the Illinois Supreme Court's opinion on when to apply the test. *See* 32a. The Court never looked at the small damage situation as one of a class of cases. It saw the consideration an option—one it could choose to apply or not. It therefore turned to cases outside Illinois to form an assessment that high ratios such as 75 to 1, 59 to 1, and 29-1 "were less the result of small compensatory damages and more the result of the particularly egregious conduct which caused the plaintiffs great personal harm." 30a.

The differences gleaned in other case results by that Court were in fact different (sexual harassment and psychological turmoil) from the deliberate false statements with intentional malice inflicted on Lowe, and therefore should not have been a strawman for the Court's analysis, which then led it to disregard this Court's ruling that ratios were inapplicable in small damage situations.

Moreover, the Illinois Court's consideration is counter to that of other courts.

Cases looking at small damage awards consider the impact of attempting to make the victim whole. In fact, the United States Court of Appeals upheld a 10,000 to 1 ratio in *Provost v. City of Newburgh*, 262 F.3d 146 (2d Cir. 2001) ($1.00 nominal damages and $10,000 punitive damages confirmed). In *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996), the same court upheld a $1.00 malicious prosecution award with a $125,000.00 punitive damages award, a 125,000-1 ratio. A $1.00 nominal award upheld a $50,000.00 punitive damages award in *Tolbert v. Queens College*, 242 F.3d 58 (2d Cir. 2001).

Mathias, 347 F.3d 672 (7th Cir. 2003), was a diversity suit under Illinois law. The Seventh Circuit held that *State Farm* did not change Illinois's standards. This "bed bug" case was considered in depth by the trial court at 88a .

There, the Seventh Circuit approved a $372,000.-00 punitive damages award on two $5,000.00 damage awards. Chief Judge Posner specifically explained why a ratio limit was inapplicable because the type of harm involved was hard to detect, the defendant's litigation strategy made it difficult to resolve the case, and that "punitive damages should be measured by standards or rules." Id. at 676. *Mathias* is the most relevant *post-State Farm* case, yet it is given no consideration in the Illinois Supreme Court's conclusion. 39a.

The Seventh Circuit had stated that the proportionality limits on punitive damages set forth in *State Farm* should exist except when "the probability of detection is very low....or the crime is potentially lucrative." In a given case, a court must consider "why

punitive damages are awarded in the first place." 347 F.3d at 676. These considerations include situations where the defendant has "inflicted largely dignitary harms;" where the injuries are "too slight to give the victim an incentive to sue," and where the compensatory damages are so low that they would "enable the defendant to commit the offensive act with impunity." 347 F.3d at 676-77.

In *Mathias*, the harm was "slight and at the same time difficult to quantify" directly. *Id.* at 677. The Court found that fixing the punitive damages to a ratio in small damage cases would likely cause plaintiffs difficulty in financing a lawsuit and obtaining counsel. Those costs would allow a wealthy defendant to use its resources to litigate aggressively to make it so costly to a plaintiff that it would make litigation difficult, if not impossible to present its claim. *Id.*

Four elements were identified forming the bases for punitive damages from the *Mathias* case: 1) that where dignitary harms occur actual damages "do not always 'do the trick'" because damages are too small, 2) small actual damages do not provide the "victim an incentive to sue and are insufficient to deter and punish the defendant," 3) punitive damages can prevent a defendant from profiting from wrongful conduct, and 4) defendant's wealth enables it to mount an aggressive defense. None of these considerations or objectives were applied by the Illinois Supreme Court below.

As this Court has repeatedly stated, the analysis of punitive damages is individual to each case and the relevance of damage awards outside the state have limited relevance because the standards and state

policies of other states are different and may not be factors a state court may employ. *BMW v. Gore*, 517 U.S. at 565: "transactions in jurisdictions other than Alabama had no relevance to Dr. Gore's claim." *State Farm*, 538 U.S. at 421: "the Campbell's counsel convinced the trial court that there was no limitation on the scope of evidence that could be considered under our precedents."

Similarly, the Illinois Court's out-of-state review to seek guidance on the concept of ratios accepts the application of state law in other jurisdictions and imports the considerations of those states wholesale into the considerations applicable to Lowe here under Illinois law and contrary to the constitutional line in the sand drawn by this Court in that form of analysis. "Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the ususal case, would need to apply the laws of their relevant jurisdiction." *State Farm*, 538 U.S. at 491-92. The Illinois Supreme Court did not apply the law applicable to the out-of-state cases in its look at the bottom-line ratio result; yet, it accepted wholesale the outcome.

Moreover, the Illinois Court's focus on the ratio of actual to punitive damages appears to have been a self-imposed mandatory act: "we must consider the ratio between the actual harm suffered by Lowe and the punitive damages." 31a. To do so, that Court opined that: "In our estimation, the best way to determine whether a given ratio is appropriate is to compare it to punitive damages awards in other, similar cases." 35a. It looked at two cases, one a federal circuit

court decision under four sections of the Labor Management Reporting and Disclosure Act in *Argentine v. USWA*, 287 F.3d 476 (6th Cir. 2002) and *Turner v. Firstar Bank, N.A.*, 363 Ill. App.3d 1150 (2006), for wrongful repossession. 36a. Punitive damages of 42.5 and 20 to 1 were affirmed in these cases.

The Illinois Court's decision treats the ratios as if they are a considerable concern under the due process clause even though in *State Farm*, this Court stated that "these ratios are not binding, they are instructive." 538 U.S. at 425. While accepting that a bright line or a mathematical formula has never been imposed by the Supreme Court, the Illinois Court concluded that a ratio in the range of 29 & 75 to 1 is not "appropriate where the Union's conduct was much less egregious." 35a.

The Illinois Supreme Court's disturbance in this constitutional case law by imposing a ratio in small damage cases is compounded by the decision in *Gavin v. AT&T, Inc.*, 464 F.3d 634, 641 (7th Cir. 2006). There, the Seventh Circuit explained that "The proper focus of analysis of the ratio itself is the adequacy of the combined award of compensatory and punitive damages to motivate the prosecution of a meritorious claim." Hence, larger ratios for punitive damages in small damage cases encourage civil resolution of disputes as explained in *Mathias*. Ratios are not, as the Illinois Supreme Court opined, a directive by the federal constitution to limit punitive damages in small damage cases.

Finally, the Illinois Court found no procedural error employed by the trier of fact. In Illinois, punitive damages may consider the attorneys' fees "expended in a case" as well as "the goals of punishment and deterrence." 38a. For the reviewing court, the evidence presented to the trial judge plainly showed the factor of fees, small actual damages, and protracted litigation that could make vindication of a claim and collection an almost impossible task.

Were the misconduct is extremely reprehensible, 378 F.3d 790, 799 (8th Cir. 2004), punitives must be available. *BMW v. Gore*, 517 U.S. at 579, 580, presumes that "deliberate false statements" are reprehensible and therefore sufficient to justify a large award. The Court below disagreed.

This Court has never stepped back from ensuring that small damage cases may see large ratio awards. The Illinois Supreme Court, however, has taken this Court's admonitions and applied the ratio to the small damage case as well which creates an inconsistency in the law and a great concern that wealthy persons may be encouraged to engage in such improper and non-civil behaviors as a business cost.

Justice Garman's concerns set forth in the dissent are not addressed in the majority opinion: "similarly situated potential plaintiffs must know that thy will receive adequate compensation to justify filing suit in these types of case, or to offset the extreme litigation costs occasioned by overly and wrongfully aggressive defendants." 44a. That concern is recognized by the majority, but not answered in the Court's Opinion.

The Illinois Appellate Court reversed by the Illinois Supreme Court recognized these very concerns that the need for deterrence required a departure from a single digit multiple:

> In this case, the ratio of punitive damages, $525,000, to compensatory damages, $4,280, is approximately 115 to 1. Defamation actions, like in the present case, involve injury to reputation. Injury to reputation may result in a small amount of economic damages. The value of such damage is hard to determine. The injury itself is even hard to detect. Thus, we believe that the trial court was justified in exceeding a single-digit ratio. In fact, a punitive damages award in the single-digit ratio would be so paltry in this case that the Union, with all of its assets, would hardly be punished or deterred.

63a.

While recognizing that Lowe required the assistance of a non-profit organization to prosecute this protracted litigation, and the trial court's consideration of those fees was reasonable under "Illinois common law," it found that under the guideposts set forth in *State Farm* and *Gore* that "[a]n award of $325,000 takes into consideration a reasonable amount of attorney fees expended by Lowe Excavating in prosecuting its claim and is ample to punish the Union and deter the Union and others from committing future like acts. Such an award also results in a constitutionally acceptable ratio of approximately 75 to 1. 65a.

The Supreme Court of Illinois determined that even $325,000 was "unconstitutionally excessive" not because it would deter Local 150 and others in the future and punish Local 150, the primary reasons for punitive damages. On its relook at the facts, that Court balanced not these matters, but its view that the union's libel was "minimally reprehensible" and that Lowe had not shown further injury to its business relations. 39a.

Those findings are not the ones set forth by this Court. If they are, then this Court's decisions have been misconstrued by many courts including the Seventh Circuit in the same geographical area.

In sum, the Illinois Supreme Court's Opinion fails to find gross excessiveness in the punitive damages award or proper considerations of reprehensibility and ratios in small damage cases. Its influential ruling on the meaning of the Constitution will cause further fracturing of the role punitive damages has to society. Therefore, the Petition should be granted.

B. The Award of Punitive Damages by a Trial Judge Conducting a Bench Trial Does not Engender the Same Constitutional Concerns for a Punitive Damages Award as an Jury Award Unrestrained by An Explanation of its Views

This Court's cases involving punitive damages have concerned only situations involving jury awards. *BMW v. Gore*, *Cooper Industries*, *State Farm*, and *Phillip Morris*. The Opinion of the Court in *Phillip Morris, Inc.* is replete with references to how the jury

could err in applying the standards. In *Phillip Morris*, 127 S. Ct at 1064-65, the Court identifies three clear errors that the Oregon Supreme Court committed in its review: "(1)...that a jury could not base its award upon 'dissimilar acts of a defendant....(2) that '[i]f a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all,"... And it stated (3) that '[i]t is unclear to us how a jury could 'consider' harm to others, yet withhold that consideration from the punishment calculus."

In the case at bar, a bench trial was conducted where the trial judge held hearings that were transcribed and issued a written decision setting forth findings of facts and conclusions of law describing why punitive damages should be awarded and the considerations from the evidence that informed his decision to impose punitive damages and how the amount was essentially arrived at.

The Illinois Supreme Court found the distinction in the case law between jury and bench trial decisions "to be of no consequence." 14a. The distinction is important because a judge considers both facts and law and explains the decision whereas a jury resolves material facts without explanation. The situation with a judge as trier of fact has a long history of being a fair procedure and traditionally subject to a different appellate review standard.

Certainly, a judge's written decision explaining the circumstances why punitive damages should be awarded is a "'a fair procedure...entitled to a strong presumption of validity.'" *BMW v. Gore*, 517 U.S. at 586-87 (Breyer, J., O'Connor, J., Souter, J.)

(concurring). This is the antithesis of a "'grossly excessive' punitive award amount[ing] to an 'arbitrary deprivation of property without due process of law.'" *Id quoting TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993). The concern in that case was that "a jury has fixed the punitive damages" and "unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." 517 U.S. at 587.

This should be the natural result of this Court's observation in *State Farm* that the "three guideposts in *Cooper Industries* and mandated appellate courts to conduct *de novo* review of a trial court's application of them to the jury's award." 538 U.S. at 418. Of course, "[a] jury must be instructed," *State Farm*, 538 U.S. at 422, whereas a trial judge need not.

In a state court case not subject to the Seventh Amendment, an abuse of discretion standard is the standard of review even in a federal diversity court's review of the excessiveness of a jury award under state law. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 434-35, 436 (1996).

There, the Court observed the practical issues of the Seventh Amendment within the federal judicial system. Yet, it correctly observed that "[t]rial judges have the 'unique opportunity to consider the evidence in the living courtroom context," *Taylor v. Washington Terminal Co.*, 408 F.2d 145, 148 (C.A.D.C. 1969) while appellate judges see only the 'cold paper record.' 66 F.2d at 431." 518 U.S. at 438. Therefore, constitutional review of a trial judge's determination of excessiveness

of a damage award under state law was held to be an abuse of discretion applies.

Clearly, state law here provides factors that provide the trier of fact with "constraining legal force" on assessing punitive damages that was reasonably predictable for the defendant here, and of long standing in Illinois, *i.e.*, the consideration of the legal fees expended in successful prosecution of Lowe's defamation claim. *BMW v. Gore*, 517 U.S. at 592 (dissenting opinion).

The Illinois Supreme Court did not consider in Local 150's appeal that the punitive damages award was an inconsequential determination to it. Rather, it inferred without any reference to the net worth of the Union that had represented to the trial court it could pay any amount of punitive damages and the Union admitted it had available "several million dollars" to do so, C-1557 ll.6-8, the amount awarded was unreasonable. The record shows the Union's net worth in 2004 was in excess of $55 million.

If the need to assess the impact of an award on a defendant no longer looks to its ability to pay, then the concept of an award functioning as a deterrence against similar future behavior becomes a nullity—the award will never be tailorable to that purpose or punishment which are the overarching principles of state interest subscribed to in *BMW v. Gore*, 517 U.S. at 568.

The Seventh Circuit's presentation and review of the basis for the common law rationale for punitive damages provides an apt analysis similar in nature to this Court's understanding of the issue. *Mathias*, 347

F.2d at 676-77. The Seventh Circuit's opinion identifies the basis for civil remedies as they provide "an alternative for criminal prosecution of minor crimes." Id. The example provided in the opinion "is deliberately spitting in a person's face, a criminal assault." In this example,

> Compensatory damages would not do the trick in such a case, and this for three reasons: because they are difficult to determine in the case of acts that inflict largely dignitary harms; because in the spitting case they would be too slight to give the victim an incentive to sue, and he might decide instead to respond with violence—and age-old purpose of the law of torts is to provide a substitute for violent retaliation against wrongful injury—and because to limit the plaintiff to compensatory damages would enable the defendant to commit the offensive act with impunity provided that he was willing to pay, and again there would be a danger that this act would incite a breach of the peace by his victim.

Mathias, 347 F.3d at 677.

The very same considerations apply to the tort of libel. It is a reputational injury. A "deliberate false statement" was considered by this Court in *Gore* to represent a situation warranting a high punitive damage ratio. 517 U.S. at 580. The malicious level of this tort should not be subject to a lower level of reprehensibility then cases involving any physical injury.

Here, Mr. Brei provided Lowe the benefit of the doubt after the February 1988 picketing at Canterbury place with a second chance, because Lowe had indeed obtained limited restraining orders against Local 150 from the trial court. With the Union's resumed publications in September 1988 again professing with signs that Lowe did not pay prevailing wages, Mr. Brei chose to believe the Union's deliberate false statements, disbelieve Lowe was paying prevailing wages, and stop doing business with Lowe.

Finally, the measure employed below to set the initial measure of punitive damages considered attorneys' fees without any consideration of interest, inflationary facts, and lost opportunity costs. *See Library of Congress v. Shaw*, 478 U.S. 310, 322 (1986);and *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 770 (7th Cir. 1982) (award where "'no ground was surrendered without a struggle, and Uniroyal litigated each issue in this case.'"). No case is to the contrary.

CONCLUSION

The Petition for a writ of certiorari to the Supreme Court of Illinois should be granted.

Respectfully submitted,

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Dated: October 26, 2007

Docket Nos. 101231, 101347 cons..

IN THE SUPREME COURT OF ILLINOIS.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, Appellant and Cross-Appellee, v. LOWE EXCAVATING COMPANY, Appellee and Cross-Appellant.

Opinion filed November 30, 2006

JUSTICE FITZGERALD delivered the judgment of the court, with opinion.

Justices Freeman, Kilbride, Karmeier, and Burke concurred in the judgment and opinion.

Justice Garman dissented, with opinion.

Chief Justice Thomas took no part in the decision.

OPINION

This case involves litigation spanning 18 years between plaintiff, Lowe Excavating Company (Lowe), and defendant, International Union of Operating Engineers, Local 150 (the Union). In 1988, Lowe filed a multicount complaint against the Union in the circuit court of McHenry County, generally alleging that the Union picketed a Lowe work site with placards containing false information. After a bench trial, the trial court ruled in favor of the Union. The appellate court reversed, concluding that Lowe proved a cause of action for trade libel because the evidence showed that the Union made false statements and the statements

were made with actual malice. On remand, the trial court awarded Lowe $4,680 in compensatory damages and $525,000 in punitive damages. The appellate court reduced the punitive damages award to $325,000. 358 Ill.App.3d 1034, 295 Ill.Dec. 344, 832 N.E.2d 495. We granted the parties' petitions for leave to appeal. For the reasons that follow, we reverse the judgment of the appellate court.

BACKGROUND

Lowe is an Illinois corporation that performs excavating and site-preparation services. In February 1988, Lowe was performing excavation work at the Canterbury Place Retirement Community in McHenry County. Specifically, Lowe was working on a portion of the project known as Ballashire Hall, which was funded by the federal government through the Department of Housing and Urban Development (HUD). In order to obtain the contract on this project, Lowe had to certify its payroll with the federal government, and thus had to demonstrate that it was paying its employees prevailing wages and benefits established by the United States Secretary of Labor. 40 U.S.C. § 276a (1982).

On February 15, 1988, the Union began picketing the Ballashire Hall site with placards stating:

> "NOTICE TO THE PUBLIC LOWE EXCAVATING DOES NOT PAY THE PREVAILING WAGES AND ECONOMIC BENEFITS FOR OPERATING ENGINEERS WHICH ARE STANDARD IN THIS AREA OUR DISPUTE CONCERNS ONLY

SUBSTANDARD WAGES AND BENEFITS PAID BY THIS COMPANY LOCAL 150

International Union of Operating Engineers, AFL CIO."

Lowe was ordered off the project by the general contractor as a result of the Union's picketing. On that same day, Lowe filed a complaint in the McHenry County circuit court seeking a temporary restraining order (TRO), preliminary and permanent injunctions, and damages. The complaint alleged a cause of action for tortious interference with a prospective economic advantage. The Union promptly filed a petition for removal of the matter to federal court, asserting that Lowe's complaint sought relief for an unfair labor practice, which was a federal law issue. The federal court found that it did not possess subject matter jurisdiction over Lowe's cause of action and returned the cause to the circuit court.

Lowe subsequently amended its complaint to allege causes of action for trade libel, tortious interference with a contractual relationship, tortious interference with a prospective economic advantage and negligent interference with a contract. Lowe also continued to seek a TRO and further injunctive relief. The trial court granted Lowe's request for a TRO, but denied Lowe's request for other injunctive relief as being preempted by federal law. Lowe then filed an interlocutory appeal of the trial court's judgment. The appellate court concluded that the cause of action was not preempted by federal law and thus remanded the matter for the circuit court to review Lowe's motion for a preliminary injunction. *Lowe Excavating Co. v.*

International Union of Operating Engineers Local No. 150, 180 Ill.App.3d 39, 129 Ill.Dec. 300, 535 N.E.2d 1065 (1989) (*Lowe I*). The Union filed a petition for leave to appeal to this court, which was denied. *Lowe Excavating Co. v. International Union of Operating Engineers*, 126 Ill.2d 560, 133 Ill.Dec. 669, 541 N.E.2d 1107 (1989) (table). The Union then filed a petition for a writ of *certiorari* to the United State's Supreme Court, which was likewise denied. *International Union of Operating Engineers, Local 150 v. Lowe Excavating Co.*, 493 U.S. 975, 110 S.Ct. 499, 107 L.Ed.2d 502 (1989).

The matter proceeded to a bench trial in April 2000. At trial, the relevant evidence demonstrated that Lowe has been in business since 1969. Prior to 1988, Lowe employees were not unionized. In 1987, Colin Darling, a business agent for the Union, received information about the wages and benefits paid to Lowe employees from two individuals who were then employed with the company. That same year, the Union, at the invitation of Lowe's president, Marshall Lowe, met with Lowe employees, seeking to represent them for collective-bargaining purposes. Negotiations between the Union and Lowe stalled. Several months later, in February 1988, the Union decided to picket Lowe because it believed that the company was not paying area-standard wages. The decision to picket was made by Darling and another Union employee without any further investigation into Lowe's wage or benefit packages.

On Friday, February 12, 1988, the Union sent Lowe a Mailgram indicating that it would be picketing at Ballashire Hall because Lowe was not paying its operating engineers area-standard wages. Lowe sent a

telegram back to the Union which stated: "We are paying area standards." The Union nevertheless began picketing the Ballashire Hall work site on the following Monday, February 15, 1988, at 6 a.m.

The Union claimed that it did not know that Ballashire Hall was a federally funded project when it began picketing. However, the evidence presented at trial demonstrated that the Union was quickly advised of this fact by Bradley Brei, the president of FAMCO, the company serving as the general contractor of the Canterbury Place project. Brei testified that, when the picketing started, he approached Darling and "I asked Mr. Darling why they were even there, that Ballashire Hall was a HUD project and that I had already filed certified payrolls with HUD that Lowe Excavating was paying the prevailing wage rates and I could not understand on what bases * * * he was there or why the pickets were there." Despite this information, the Union continued picketing and did not cease until Brei ordered Lowe to discontinue its work and Lowe's equipment was removed from the site.

Lowe remained off the Ballashire Hall project until September 1988, when employees returned to do finishing work. Although the Union knew at that point, through Colin Darling, that Ballashire Hall was a federally funded project, it nevertheless picketed the work site. Lowe was removed a second time from the Ballashire Hall project by Bradley Brei. According to Marshall Lowe, the company suffered lost profits of $4,680 as a result of its removal from the Ballashire Hall project. Additionally, FAMCO declined to do business with Lowe for five to six years. Brei testified that he did not want to work with Lowe because he felt

the company did not have its "house in order."

At trial, Lowe presented testimony from Frank Stampler, a certified public accountant, who stated that an audit of Lowe's wages and benefits for the period of January 13, 1988, through February 16, 1988, demonstrated that Lowe employees at the Ballashire Hall project were actually being paid more than the federal prevailing wage rate. Additionally, John O'Hagan, president of Human Resources Planning Associates, a business which provides compensation, benefits and insurance planning services, testified that he compared Lowe's benefits with those of the Union in 1987 and 1988 at the request of Marshall Lowe. O'Hagan determined that Lowe's health and life insurance plans were superior to the those of the Union.

Marshall Lowe, however, admitted that, prior to August 1988, Lowe did not pay its employees prevailing wages and was not meeting the area standards for wages and employee benefits. Marshall Lowe specified that between 1969 and 1986, Lowe was not paying contract wage rates received by Union employees and did not offer a retirement plan for its employees. This practice changed when Lowe and the Congress of Independent Unions (CIU) entered into a collective-bargaining agreement in 1988, which provided that Lowe would pay prevailing wages at all times retroactive to April 15, 1988. Marshall Lowe added that the Ballashire Hall project was one of the first prevailing wage projects that Lowe ever worked on and, therefore, was one of the first times Lowe paid its employees the prevailing wage.

After hearing the evidence, the trial court ruled in favor of the Union on all counts. Lowe appealed, and the Union cross-appealed. The appellate court reversed the judgment of the trial court. *Lowe Excavating Co. v. International Union of Operating Engineers, Local No. 150*, 327 Ill.App.3d 711, 262 Ill.Dec. 195, 765 N.E.2d 21 (2002) (*Lowe II*). The appellate court concluded that the statement appearing on the placards used by the Union in picketing Lowe constituted defamation *per quod*. *Lowe II*, 327 Ill.App.3d at 722, 262 Ill.Dec. 195, 765 N.E.2d 21. The court determined that, after being told by Brei that Ballashire Hall was a federally funded project, that Lowe's payroll had been certified, and that Lowe was paying prevailing wages, "Darling at least should have entertained serious doubts as to the truth of the statements contained on the picket signs." *Lowe II*, 327 Ill.App.3d at 723, 262 Ill.Dec. 195, 765 N.E.2d 21. Because the Union continued to picket even after possessing this information, the court determined that the Union acted with reckless disregard for the truth and, therefore, the defamatory statements made were made with actual malice. The appellate court rejected the Union's claim on cross-appeal that Lowe's defamation claim was preempted by federal law. *Lowe II*, 327 Ill.App.3d at 723, 262 Ill.Dec. 195, 765 N.E.2d 21.

The appellate court then concluded that punitive damages could be appropriate in this case in light of its finding that the Union acted with actual malice. *Lowe II*, 327 Ill.App.3d at 724, 262 Ill.Dec. 195, 765 N.E.2d 21. The appellate court thus directed the trial court to consider evidence of Lowe's attorney fees in the event that it decided to award punitive damages. *Lowe II*, 327 Ill.App.3d at 725, 262 Ill.Dec. 195, 765 N.E.2d 21. The court cautioned, however, that attorney fees could not

"be awarded as a separate entity distinct from punitive damages." *Lowe II*, 327 Ill.App.3d at 725.

The Union sought leave to appeal from this court, and leave to appeal was denied. *Lowe Excavating Co. v. International Union of Operating Engineers, Local No. 150*, 199 Ill.2d 557, 266 Ill.Dec. 441, 775 N.E.2d 3 (2002) (table). The Union then filed a petition for a writ of *certiorari* to the United States Supreme Court, which was likewise denied. *International Union of Operating Engineers, Local 150 v. Lowe Excavating Co.*, 537 U.S. 1028, 123 S.Ct. 555, 154 L.Ed.2d 442 (2002).

Upon remand, the trial court first entered a judgment in favor of Lowe in the amount of $4,680 for actual damages sustained as a result of the Union's conduct. Lowe then filed a motion for punitive damages wherein it asserted that attorney fees plus expenses amounted to $506,659.78, and ultimately sought punitive damages of $5 million. The trial court accepted briefing from both parties on the issue of punitive damages and awarded punitive damages against the Union in the amount of $325,000. In doing so, the trial court specifically stated that punitive damages were appropriate in light of the appellate court's finding of actual malice. The court added that punitive damages were necessary to deter the Union from similar conduct in the future. The court then noted that, while the actual damages in this case were small, Lowe "incurred substantial attorney's fees and expenses in this protracted litigation." The court specified, however, that it was "not awarding attorney's fees."

The record shows that the court initially

considered the fees of Lowe's attorney, Gerard C. Smetana, which, according to his affidavit, totaled $304,101.62. The trial court did not consider the fees of Smetana's cocounsel, Michael E. Avakian of the Center on National Labor Policy, Inc., as it did not appear that Lowe was responsible for payment of the $194,350 in fees and expenses incurred by Avakian and his organization. Lowe moved for reconsideration of the trial court's punitive damages award, asserting that the trial court improperly ignored the fees incurred by Avakian. The trial court reconsidered and increased the punitive damages award to $525,000.

Both parties appealed. Neither party challenged the compensatory damages awarded, but both parties took issue with the award of punitive damages. The Union initially argued that punitive damages were inappropriate in this case. The appellate court disagreed, holding that punitive damages are available in defamation actions; that they were proper in this case because the Union acted with actual malice; and that the trial court imposed punitive damages for appropriate purposes, namely, punishing the Union for its malicious conduct and dissuading the Union from engaging in similar conduct in the future. 358 Ill.App.3d at 1040-41, 295 Ill.Dec. 344, 832 N.E.2d 495 (*Lowe III*).

The Union next raised a common law challenge asserting that the punitive damages awarded were excessive. The appellate court rejected this claim, stating that "[n]othing in the record suggests that the trial court's award was the product of passion, partiality, or corruption." *Lowe III*, 358 Ill.App.3d at 1041, 295 Ill.Dec. 344, 832 N.E.2d 495. The appellate court added that the trial court carefully considered the

nature and enormity of the Union's misconduct and attempted to impose a sanction sufficient to deter the Union from similar offenses, while mindful of the amount of attorney fees incurred by Lowe.*Lowe III*, 358 Ill.App.3d at 1041, 295 Ill.Dec. 344, 832 N.E.2d 495.

The Union further argued that the punitive damages awarded were unconstitutionally excessive in violation of the due process clause. The appellate court agreed, finding that the ratio of punitive damages to compensatory damages was approximately 115 to 1 and was therefore "exceedingly disproportionate." *Lowe III*, 358 Ill.App.3d at 1044, 295 Ill.Dec. 344, 832 N.E.2d 495. The appellate court thus reduced the punitive damages award from $525,000 to $325,000, finding that "[s]uch an award * * * results in a constitutionally acceptable ratio of approximately 75 to 1." *Lowe III*, 358 Ill.App.3d at 1046, 295 Ill.Dec. 344, 832 N.E.2d 495. As a result of this finding, the appellate court did not address Lowe's contention that the amount of punitive damages awarded was insufficient. *Lowe III*, 358 Ill.App.3d at 1046, 295 Ill.Dec. 344, 832 N.E.2d 495.

We allowed the parties' petitions for leave to appeal, and now consider whether the award fashioned by the appellate court was unconstitutionally excessive as urged by the Union, or whether the award was deficient, as urged by Lowe.

ANALYSIS

At the outset, we make clear that neither party contests the compensatory damages awarded in this case. Further, neither party is raising a common law challenge to the award of punitive damages. The issue

in this case is whether the punitive damages awarded violate the due process clause of the fourteenth amendment, which prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. See *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 416, 123 S.Ct. 1513, 1519-20, 155 L.Ed.2d 585, 600 (2003).

I. Standard of Review

The parties disagree as to the proper standard of review that should be used in reviewing this constitutional claim. Lowe asserts that an abuse of discretion standard should be applied and, in support, cites to *Franz v. Calaco Development Corp.*, 352 Ill.App.3d 1129, 1138, 288 Ill.Dec. 669, 818 N.E.2d 357 (2004).

Lowe misstates the holding of *Franz*. Contrary to Lowe's assertions, the *Franz* court never used an abuse of discretion standard of review, under any circumstances, to determine the propriety of a punitive damages award. The *Franz* court did, however, provide a clear directive regarding the standard of review that should be used with respect to the constitutional claims raised herein. Citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), the court explicitly stated: "The standard of review for the constitutional question of whether a punitive damages award is excessive in violation of due process is indeed *de novo* * * *." *Franz*, 352 Ill.App.3d at 1147, 288 Ill.Dec. 669, 818 N.E.2d 357.

Also relying on the Supreme Court's decision in *Cooper*, as well as statements made by the Court in

State Farm, the Union maintains that *de novo* review is proper in this case. In *Cooper*, the Supreme Court considered the proper standard of review in cases where punitive damages were alleged to be constitutionally excessive. In doing so, the Court acknowledged that the assessment of punitive damages was a form of punishment upon the wrongdoer and thus looked to jurisprudence in all areas of the law where "constitutional violations were predicated on judicial determinations that the punishments were 'grossly disproportional to the gravity of ... defendant[s'] offense[s].' " *Cooper*, 532 U.S. at 434, 121 S.Ct. at 1684, 149 L.Ed.2d at 686, quoting *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S.Ct. 2028, 2036, 141 L.Ed.2d 314, 329 (1998). The Court noted that cases of this ilk required "an independent examination" of the relevant information by reviewing courts. *Cooper*, 532 U.S. at 435, 121 S.Ct. at 1685, 149 L.Ed.2d at 686. The Court further noted that the question of whether a punishment is constitutionally excessive " 'calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate.' "

> The *Cooper* Court explored the reasons why *de novo* review was necessary under these circumstances. The Court explained that the concept of gross excessiveness is a "fluid concept[ ]" that cannot be precisely articulated. *Cooper*, 532 U.S. at 436, 121 S.Ct. at 1685, 149 L.Ed.2d at 687, quoting *Ornelas v. United States*, 517 U.S. 690, 696, 116 S.Ct. 1657, 1661, 134 L.Ed.2d 911, 918 (1996). Concepts of this nature acquire " 'content only through application' " and are best controlled and clarified through independent review. *Cooper*, 532

U.S. at 436, 121 S.Ct. at 1685, 149 L.Ed.2d at 687, quoting *Ornelas*, 517 U.S. at 697, 116 S.Ct. at 1662, 134 L.Ed.2d at 919. *De novo* review, under such circumstances, serves to " 'unify precedent' " and " 'stabilize the law.' " *Cooper*, 532 U.S. at 436, 121 S.Ct. at 1685, 149 L.Ed.2d at 687, quoting *Ornelas*, 517 U.S. at 697-98, 116 S.Ct. at 1662, 134 L.Ed.2d at 919-20. Finally, the *Cooper* Court explained that *de novo* review is beneficial because it provides citizens notice of conduct that will result in punishment and serves to assure the uniform treatment of individuals engaged in similar conduct:

> " 'Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself.' " *Cooper*, 532 U.S. at 436, 121 S.Ct. at 1685, 149 L.Ed.2d at 687, quoting *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 587, 116 S.Ct. 1589, 1605, 134 L.Ed.2d 809, 834 (1996) (Breyer, J., concurring, joined by O'Connor and Souter, JJ.).

In *State Farm*, the Supreme Court reiterated some of the principles set forth in *Cooper* and stated that *de novo* review was "mandated" when considering whether a punitive damage award was unconstitutionally excessive. *State Farm*, 538 U.S. at 418, 123 S.Ct. at 1520, 155 L.Ed.2d at 601.

Lowe argues that *Cooper* and *State Farm*, and the cases upon which they relied, do not require that this court utilize a *de novo* standard of review because

those cases involved punitive damages awarded by a jury instead of a judge after a bench trial. We find this distinction to be of no consequence. Whether punitive damages were awarded by a judge or jury has no impact on the reasons articulated in *Cooper* for applying a *de novo* standard, such as unification of precedent and stabilization of the law. Accordingly, we review the constitutional question before us *de novo*.

II. Constitutionality of Punitive Damages Award

A. *Excessiveness*

The Union first argues that the appellate court erred in affirming the trial court's punitive damages award, as the damages imposed are unconstitutionally excessive in violation of due process. Lowe counters that the appellate court erred in reducing the punitive damages award and asserts that it is entitled to a greater amount of punitive damages. Lowe adds that the reduced award is deficient because it will not serve to adequately punish the Union for its misconduct against Lowe or deter the Union from similar misconduct in the future.

The parties agree that the relevant test to determine whether punitive damages awarded are excessive was set forth in the United States Supreme Court's opinion in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), and recently reiterated in *State Farm*. In those cases, the Supreme Court instructed that three guideposts should be considered in reviewing an award of punitive damages: "(1) the degree of reprehensibility of the

defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm*, 538 U.S. at 418, 123 S.Ct. at 1520, 155 L.Ed.2d at 601, citing *Gore*, 517 U.S. at 575, 116 S.Ct. at 1598-99, 134 L.Ed.2d at 826. We now consider each of these guideposts in reviewing the punitive damages award presently in dispute.

1. Degree of Reprehensibility

In *Gore*, the Supreme Court stated: "Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U.S. at 575, 116 S.Ct. at 1599, 134 L.Ed.2d at 826. Courts are instructed to consider the following factors when determining reprehensibility: (1) whether the harm caused was physical as opposed to economic; (2) whether the tortious conduct evinced an indifference to or a reckless disregard for the health and safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether the conduct involved repeated actions or was an isolated incident; and (5) whether the harm was the result of intentional malice, trickery, or deceit, or mere accident. *State Farm*, 538 U.S. at 419, 123 S.Ct. at 1521, 155 L.Ed.2d at 602. Courts are further instructed that:

"The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be

presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419, 123 S.Ct. at 1521, 155 L.Ed.2d at 602.

The appellate court considered the factors set forth in *Gore* and *State Farm* in determining the Union's degree of reprehensibility. The court concluded that the reprehensibility of the Union's conduct was heightened by facts demonstrating that Lowe was financially vulnerable because it is a small business with only 16 employees and its reputation is very important to its continued success. The appellate court specifically found that the Union's false allegations against Lowe were "potentially devastating" to Lowe's reputation and "could have financially ruined the company." *Lowe III*, 358 Ill.App.3d at 1043, 295 Ill.Dec. 344, 832 N.E.2d 495. Further, the appellate court concluded that the Union's conduct was not isolated, because the Union picketed on more than one occasion and continued to picket even after learning that Ballashire Hall was a federally funded project and Lowe was required to pay prevailing wages. *Lowe III*, 358 Ill.App.3d at 1043, 295 Ill.Dec. 344, 832 N.E.2d 495. Finally, the court reiterated its previous holding that the Union's conduct was the product of intentional malice. The court stated that the finding of malice was the "law of the case," and it declined to alter the holding in light of evidence demonstrating that the Union knew Lowe's payrolls had been certified by the Department

of Labor. *Lowe III*, 358 Ill.App.3d at 1043, 295 Ill.Dec. 344, 832 N.E.2d 495.

The Union maintains that the appellate court's findings were erroneous because none of the factors required to demonstrate reprehensibility were proven. Lowe disputes the Union's claim, but agrees that the first two reprehensibility factors do not weigh in its favor. Lowe concedes that the Union's conduct created a harm that was economic rather than physical and that the Union's conduct did not evince a reckless disregard or indifference to the health and safety of others. A dispute arises, however, with respect to the third reprehensibility factor-financial vulnerability. The Union maintains that the evidence presented at trial was insufficient to demonstrate that Lowe was financially vulnerable. Lowe asserts that the evidence demonstrated that it is a small business and this fact proves its financial vulnerability. Lowe also argues that evidence in the record demonstrates that the company had to "engage in odd jobs in the winter to stay afloat until it was recalled for work in the Spring."

Contrary to Lowe's contentions and the appellate court's findings, we conclude that the record in this case is devoid of evidence demonstrating that Lowe was financially vulnerable. Lowe claims that the record shows that it was forced to "engage in odd jobs" after the picketing. However, the portion of the record Lowe cites merely demonstrates that, some four to six years after the Ballashire Hall project, FAMCO contracted Lowe to perform snow removal work. Lowe cites to nothing in the record indicating that it was required to do such work to "stay afloat," as it now

contends.

Further, the fact that Lowe is a "small business" does not, by itself, prove financial vulnerability. While we agree with the appellate court that small businesses often rely on reputation to maintain and attract customers, the evidence presented in this case demonstrated that Lowe temporarily lost only one customer, FAMCO, as a result of the Union's conduct. The evidence also demonstrated that Lowe operated as a nonunion company paying less than the prevailing wage rate for the area without incident from 1969 until 1988 when the Union picketed the Ballashire Hall site. There is no evidence that Lowe lost any other business as a result of the Union's conduct. Moreover, the only financial loss proven was the $4,680 in lost profits stemming from the Ballashire Hall project. Lowe provided no other financial information which would demonstrate its vulnerability.

We acknowledge that the United States Court of Appeals for the Third Circuit affirmed a finding by the United States district court that a "modest family-run business" was financially vulnerable without any evidence of its financial circumstances. See *Willow Inn, Inc. v. Public Service Mutual Insurance Co.*, 399 F.3d 224 (3d Cir.2005). In *Willow Inn,* the court awarded punitive damages to the plaintiff after evidence demonstrated that the defendant insurer acted in bad faith and withheld payment on Willow Inn's property damage claim. In determining reprehensibility, the court found that Willow Inn was financially vulnerable based on evidence demonstrating that after being damaged by a tornado, the bar/restaurant was unable to afford professional help to clear away the rubble and

initiate repairs. Instead, for 36 hours following the tornado, the owner and neighborhood volunteers worked to protect the building from further damage and clear away debris to make the surrounding area less hazardous. *Willow Inn*, 399 F.3d at 232. Lowe provided no evidence akin to that presented in *Willow Inn* which would demonstrate its financial vulnerability. Accordingly, we find that case to be readily distinguishable.

Lowe cites to *Planned Parenthood v. American Coalition of Life Activists*, 422 F.3d 949 (9th Cir.2005), to support its assertion that it was financially vulnerable. In that case, the defendants threatened and attempted to intimidate several doctors who performed abortions. The federal appeals court for the Ninth Circuit held that the defendant's conduct was reprehensible in light of the physician's financial vulnerability. Specifically, the court determined that the physician's livelihoods depended on their practices, and the defendants intentionally tried to scare the doctors into suspending their practices. In fact, one doctor stopped practicing because he feared for his life. *Planned Parenthood*, 422 F.3d at 958. Lowe argues that its livelihood and that of its employees depended on its ability to work, just as the doctors in *Planned Parenthood*. We find Lowe's comparison to be unpersuasive. In *Planned Parenthood*, the doctors' entire practice was negatively affected by the conduct of the defendants, and the doctors were afraid to perform a medical procedure which was the focus of their practices. In this case, Lowe was prohibited from working at one jobsite and temporarily lost the business of one customer. The record contains no evidence that Lowe lost other contracts or was unable

to perform excavating work at other locations as a result of the Union's conduct. Accordingly, we conclude that the appellate court erred in finding that Lowe was financially vulnerable.

We now turn to the fourth reprehensibility factor-whether the Union's conduct constituted an isolated incident or a repeated act of misconduct. The appellate court concluded that the Union's conduct was repeated, finding that the Union picketed with false information from February 15, 1988, until June 30, 1988, and then again from September 28, 1988, until October 11, 1988. *Lowe III*, 358 Ill.App.3d at 1043, 295 Ill.Dec. 344, 832 N.E.2d 495.

The Union asserts that the appellate court erred in considering picketing conducted at any time other than February 15, 1988. The Union maintains that in *Lowe II*, it was held liable for its conduct in February 1988 only and, therefore, its conduct on other dates should not have been part of the appellate court's determination in *Lowe III*. Lowe appears to agree that the appellate court's finding in *Lowe III* regarding periods of time between February and June 1988 and September and October 1988 was not based on the evidence, as Lowe discusses only two instances of defamation in its briefs. Specifically, Lowe cites to the Union's conduct beginning on February 15, 1988, and its conduct in September 1988 as evidence of repeated acts of misconduct.

A review of the appellate court's findings in *Lowe II*, as well as the evidence presented in the record and the parties' representations in their briefs, demonstrates that the Union falsely picketed Lowe at

the Ballashire Hall project on February 15, 1988. The Union then returned to the site on February 16, 1988, and picketed again for some portion of the day. There was testimony presented which indicated that the Union returned for a third time on February 17, 1988, but that testimony was not corroborated and was contradicted. Significantly, in their briefs, the respective parties do not treat the February picketing incidents as separate encounters, and Lowe does not argue that the Union's act of picketing on at least two, back-to-back days demonstrates recidivist conduct. Rather, Lowe points to the Union's act of returning to Ballashire Hall in September 1988 for picketing as evidence of the Union's repeated conduct. We note that there is no indication in the record, nor do the parties represent that the September picketing lasted for more than one day.

We also note that there is no indication in the record, nor do the parties argue, that the Union falsely picketed Lowe on any other occasions than those previously identified. Although the Union admits in its brief to picketing Lowe repeatedly at various work sites throughout 1988, there is no evidence suggesting that picketing at sites other than Ballashire Hall was false.

With these facts in mind, we are left to determine whether the Union's false picketing in February and September 1988 constitutes repeated conduct supporting a reprehensibility finding.

The Union argues that two instances of picketing falsely in February and September 1988 do not constitute a pattern of repeated malfeasance. In

support, the Union points to federal jurisprudence which suggests that "repeated conduct" under the reprehensibility analysis is "not merely a pattern of contemptible conduct within one extended transaction * * *, but rather specific instances of similar conduct by the defendant in relation to other parties." *Willow Inn*, 399 F.3d at 232. The Union maintains that no evidence was presented to demonstrate that it falsely picketed anyone other than Lowe and, therefore, its conduct cannot be construed as repeated malfeasance.

Lowe counters that the Union's conduct was repeated because it occurred on more than one occasion. Lowe maintains that the Union's "subsequent misconduct in September 1988" should be "counted" as evidence of recidivist behavior.

The repeated conduct factor of the reprehensibility test is grounded in the Supreme Court's opinion in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), one of the precursors to *Gore* and *State Farm*. In that case, the Supreme Court adopted certain factors that should be considered when determining whether a punitive damage award was excessive or inadequate. These factors include "the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct." *Haslip*, 499 U.S. at 21, 111 S.Ct. at 1045, 113 L.Ed.2d at 22.

In *Gore*, the Supreme Court considered whether BMW engaged in repeated misconduct when it routinely sold cars in the state of Alabama that had

been slightly damaged and repaired as "new" without disclosing the damages and repairs to the customer. The Court determined that BMW could not be labeled a recidivist even though it engaged in similar conduct in other states because its disclosure policy was not considered fraudulent in those other states. *Gore*, 517 U.S. at 577-78, 116 S.Ct. at 1599-1600, 134 L.Ed.2d at 827-28. Significantly, the Court reached this conclusion despite evidence demonstrating that a jury in a similar lawsuit had previously found that BMW's failure to disclose was fraudulent under Alabama law and awarded compensatory damages. *Gore*, 517 U.S. at 565, 116 S.Ct. at 1594, 134 L.Ed.2d at 820. However, the Court stated:

"Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law. [Citations.] Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance." *Gore*, 517 U.S. at 576-77, 116 S.Ct. at 1599-1600, 134 L.Ed.2d at 827.

Gore's treatment of the repeated conduct factor demonstrates that recidivist conduct is to be considered reprehensible, and further demonstrates that courts may look outside the misconduct committed toward the plaintiff in question to other, similar conduct, when considering the recidivism factor.

In *State Farm*, the Supreme Court reaffirmed these principles. There, the Court considered whether the defendant insurer, which was found to have engaged in fraudulent insurance practices by improperly capping claim payments, was a repeat offender. The Court declined to label State Farm a recidivist for reprehensibility purposes because the plaintiffs were unable to present sufficient evidence of other conduct similar to that which injured them. *State Farm*, 538 U.S. at 423, 123 S.Ct. at 1523, 155 L.Ed.2d at 604-05. Looking to *Gore*, the Court acknowledged that consideration of a defendant's similar, past conduct towards others was relevant to a determination of reprehensibility, but, where evidence of repeated misconduct of the sort that injured the plaintiffs in question is "scant," the conduct that actually harmed the plaintiffs "is the only conduct relevant to the reprehensibility analysis." *State Farm*, 538 U.S. at 423-24, 123 S.Ct. at 1523-24, 155 L.Ed.2d at 605. The lesson gleaned from the analysis in *State Farm* is that courts may look externally, to a defendant's similar past conduct with respect to other parties, as well as internally, to a defendant's conduct towards the plaintiff in question, when considering recidivism.

Relying on *Gore* and *State Farm*, the United States District Court for the Third Circuit put this guideline into practice in *Willow Inn* when it looked to evidence of the defendant's similar misconduct in relation to other parties as well as the defendant's repetitive conduct towards the plaintiff in question to determine whether the defendant should be labeled a recidivist. In that case, the defendant insurance company was found to have improperly withheld insurance claim payments from the plaintiff. Although

the court was disinclined to label the defendant a recidivist because there was no evidence presented which demonstrated that the defendant withheld payment of claims from other persons whom it insured, the court nevertheless gave some weight to the repeated conduct subfactor in determining punitive damages. The court stated: "[W]e consider this subfactor to be relevant, but with less force, insofar as the series of actions and inaction by PSM which delayed settlement of the claim * * * implied a concerted effort to lessen PSM's expected payment on the claim." *Willow Inn*, 399 F.3d at 232-33.

Similarly, in *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir.2004), the Eighth Circuit found the defendant to have engaged in repeated racial discrimination against the plaintiff. In doing so, the court looked to the plaintiff's testimony concerning instances in which he experienced racism, as well as the testimony of other ConAgra employees who described instances of discrimination that were factually similar to those described by the plaintiff. *ConAgra*, 378 F.3d at 798; see also *United States v. Veal*, 365 F.Supp.2d 1034, 1039 (W.D.Mo.2004) (where court found the defendant's conduct was recidivistic after evidence demonstrated that the defendant engaged in sexual harassment and discrimination against 11 different women and that the harm suffered by each woman was "severe and persistent").

Our appellate court's decision in *O'Neill v. Gallant Insurance Co.*, 329 Ill.App.3d 1166, 263 Ill.Dec. 898, 769 N.E.2d 100 (2002), also provides guidance. The facts demonstrate that the defendant refused to even consider an offer to settle a claim resulting from an

automobile accident where the policyholder was clearly negligent and the victim of the accident suffered severe and permanent injury. The defendant's conduct "turned $20,000 worth of contractual duty into a $3,010,063 judgment for a bad-faith refusal to settle" and exposed the policyholder to financial ruin. *O'Neill*, 329 Ill.App.3d at 1168, 263 Ill.Dec. 898, 769 N.E.2d 100.

In determining whether the punitive damages awarded for the defendant's bad-faith refusal to settle were unconstitutional, the court considered the repetitive nature of the defendant's conduct. The court first looked to the defendant's conduct towards the policyholder and concluded that there was evidence of repetitive misconduct. The facts showed that defendant refused to respond to a settlement demand; ignored repeated advice and pleas from the policyholder, her attorneys and claims adjusters within the company to settle; employed unnecessary legal tactics to avoid paying the claim; and lied to and threatened the policyholder. *O'Neill*, 329 Ill.App.3d at 1182-83, 263 Ill.Dec. 898, 769 N.E.2d 100. As the court summarized, "Gallant blatantly ignored its policyholder's financial security and did virtually nothing to protect her." *O'Neill*, 329 Ill.App.3d at 1183, 263 Ill.Dec. 898, 769 N.E.2d 100. The court then looked to conduct that extended beyond the policyholder's case, and considered evidence revealing a pattern of conduct, over a five-year period, where the defendant's Illinois customers suffered excess judgments based on the defendant's refusal to settle within policy limits. *O'Neill*, 329 Ill.App.3d at 1172, 1183, 263 Ill.Dec. 898, 769 N.E.2d 100. In light of this evidence, the court concluded that defendant's conduct was reprehensible and ultimately found that the punitive damages

awarded were not unconstitutionally excessive. *O'Neill*, 329 Ill.App.3d at 1185, 263 Ill.Dec. 898, 769 N.E.2d 100.

These cases demonstrate that courts are permitted to consider a defendant's conduct towards the plaintiff in question, as well as similar conduct extending beyond the plaintiff's case, when determining whether a defendant can be labeled a recidivist for reprehensibility purposes. Contrary to the Union's contentions herein, a court's consideration of recidivism should not be restricted to misconduct involving other parties unrelated to the case before the court. Thus, in applying the relevant analysis to the instant case, we find that the Union engaged in repeated acts of misconduct where the evidence demonstrated that it falsely picketed Lowe on more than one occasion in 1988. However, like the court in *Willow Inn*, "we consider this subfactor to be relevant, but with less force." *Willow Inn*, 399 F.3d at 232-33. While we certainly do not condone the Union's decision to continue to picket Lowe at Ballashire Hall after being advised that Lowe was paying the prevailing wage on the project, the fact remains that the Union falsely picketed Lowe at Ballashire Hall on two days in February 1998 and once in September 1988. There is no evidence before this court demonstrating that the Union falsely picketed Lowe, or anyone else, as a matter of course.

The defendants labeled recidivists in the cases reviewed herein each had a "pattern" of misconduct that typified the manner in which they did business. There is no evidence of a similar pattern of misconduct in this case. Accordingly, while we conclude that the Union's conduct was repeated for purposes of the

reprehensibility analysis, we afford this factor little weight in our overall assessment of reprehensibility.

We now turn to the final reprehensibility factor and consider whether the harm to Lowe was the result of intentional malice, trickery or deceit, or mere accident. Before addressing the parties' arguments, we look again to the judgments of the appellate court on this issue. In *Lowe II*, the appellate court considered whether the Union published the defamatory statements about Lowe with actual malice, *i.e.*, " 'with knowledge of their falsity or with reckless disregard of whether they were true or false.' " Lowe II, 327 Ill.App.3d at 722, 262 Ill.Dec. 195, 765 N.E.2d 21, quoting *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 65, 86 S.Ct. 657, 664, 15 L.Ed.2d 582, 591 (1966). The appellate court recognized that "[r]eckless disregard for the truth means that the defendant published the statements while entertaining serious doubts as to the truth of the statements." (Emphasis omitted.) *Lowe II*, 327 Ill.App.3d at 722-23, 262 Ill.Dec. 195, 765 N.E.2d 21. The court then looked to the facts which demonstrated that Darling was told by Brei that Ballashire Hall was a federally funded project, that Lowe's payroll had been certified and sent to the Department of Labor, and that Lowe was paying prevailing wages. The court concluded that "Darling at least should have entertained serious doubts as to the truth of the statements contained on the picket signs," and later reiterated that "the defendant committed a tort with actual malice." *Lowe II*, 327 Ill.App.3d at 723-24, 262 Ill.Dec. 195, 765 N.E.2d 21. In *Lowe III*, the appellate court stated that it "decline[d] to alter the law of the

case with regard to the malice finding." *Lowe III*, 358 Ill.App.3d at 1043, 295 Ill.Dec. 344, 832 N.E.2d 495.

Lowe now argues that we are bound by the law of the case, and therefore, must find that the Union acted with intentional malice. The Union agrees that we are bound by the law of the case, but asserts that the appellate court did not properly find actual malice. Instead, according to the Union, the appellate court made a finding of negligence by stating that "Darling at least should have entertained serious doubts as to the truth of the statements contained on the picket signs." Thus, the Union asserts that if we follow the law of the case, we must conclude that Darling's conduct was negligent rather than the product of intentional malice.

We disagree with the parties' interpretation of the law of the case doctrine. As this court explained in *Relph v. Board of Education of DePue Unit School District No. 103*, 84 Ill.2d 436, 442, 50 Ill.Dec. 830, 420 N.E.2d 147 (1981):

> "Even if the appellate court were bound by the law of the case it had announced in the first appeals, that limitation would not apply to this court. Although this court denied petitions for leave to appeal in both of the previous appeals of these cases, such action has no precedential effect and in no way amounts to a consideration of the merits of the cases. Nor does it indicate approval of the appellate court's action. [Citation.] Therefore, this is the first time these cases have been before us on the merits. Our review may cover all matters properly raised and passed on in the course of litigation. [Citation.]"

See also *Garibaldi v. Applebaum*, 194 Ill.2d 438, 447-48, 252 Ill.Dec. 29, 742 N.E.2d 279 (2000). Although this case has run the gamut of the appellate process in the past 18 years, this is our first opportunity to substantively review the appellate court's finding of actual malice. Accordingly, we are not bound by the law of the case doctrine.

However, having reviewed the issue on the merits, we nevertheless agree with the appellate court's conclusion that the Union acted with intentional malice. The facts of this case demonstrate that Darling either knew that the statements contained on his picket signs were false or, at the very least, seriously doubted their veracity. Nevertheless, he chose to picket Lowe at the Ballashire Hall project, on two occasions, demonstrating a reckless disregard for the truth or falsity of the statements. We thus find that the Union acted with intentional malice and, therefore, its conduct can be characterized as reprehensible.

We note that our overall finding of reprehensibility rests mostly on only one of the five factors set forth in *Gore*, because, as previously explained, the repeated conduct factor lends marginal weight to a finding of reprehensibility based on the facts of this case. We are thus reminded of the Supreme Court's cautionary statement in *State Farm:* "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award." *State Farm*, 538 U.S. at 419, 123 S.Ct. at 1521, 155 L.Ed.2d at 602; see also *Turner v. Firstar Bank, N.A.*, 363 Ill.App.3d 1150, 1163-64, 300 Ill.Dec. 927, 845 N.E.2d 816 (2006) (where the court found that the presence of only one reprehensibility factor was

insufficient to sustain a punitive damages award 20 times higher than the compensatory damages award); *Clark v. Chrysler Corp.*, 436 F.3d 594, 605 (6th Cir.2006) (where court held that the presence of only one reprehensibility factor was insufficient to sustain a large punitive damages award).

2. Disparity Between Actual Harm and the Punitive Damages Award

Turning to the second *Gore* guidepost, we must consider the ratio between the actual harm suffered by Lowe and the punitive damages awarded. See *Gore*, 517 U.S. at 580, 116 S.Ct. at 1601, 134 L.Ed.2d at 829; *State Farm*, 538 U.S. at 418, 123 S.Ct. at 1520, 155 L.Ed.2d at 601. Lowe suffered $4,680 in actual damages and was awarded punitive damages of $325,000. The ratio between the actual harm and the punitive damages is approximately 75 to 1. The Union argues that this ratio is unconstitutional and unreasonable and, in support cites several cases from other jurisdictions where punitive damages exceeding a single-digit ratio were deemed unconstitutionally excessive and thus reduced. Lowe counters that the double-digit ratio was not excessive because the Union's conduct was particularly egregious and the monetary value of the noneconomic harm was hard to detect and difficult to determine. In fact, Lowe asserts that the punitive damages awarded by the appellate court were deficient, and urges that the amount of punitive damages awarded should be increased.

In considering whether a punitive damages award is constitutional, courts are instructed to

consider whether there is a reasonable relationship between the punitive damages award and the potential and actual damages resulting from the defendant's conduct. *Gore*, 517 U.S. at 581, 116 S.Ct. at 1602, 134 L.Ed.2d at 830. The Supreme Court has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula" (*Gore*, 517 U.S. at 582, 116 S.Ct. at 1602, 134 L.Ed.2d at 830) and has declined "to impose a bright-line ratio which a punitive damages award cannot exceed." *State Farm*, 538 U.S. at 425, 123 S.Ct. at 1524, 155 L.Ed.2d at 605. Nevertheless, the Court has cautioned that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425, 123 S.Ct. at 1524, 155 L.Ed.2d at 605-06. The Court has also said that a punitive damages award of " 'more than 4 times the amount of compensatory damages' might be 'close to the line.' " *Gore*, 517 U.S. at 581, 116 S.Ct. at 1602, 134 L.Ed.2d at 830, quoting *Haslip*, 499 U.S. at 23-24, 111 S.Ct. at 1046, 113 L.Ed.2d at 23. The Court has, however, recognized that "because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' " *State Farm*, 538 U.S. at 425, 123 S.Ct. at 1524, 155 L.Ed.2d at 606, quoting *Gore*, 517 U.S. at 582, 116 S.Ct. at 1602, 134 L.Ed.2d at 831.

In this case, the trial court originally awarded Lowe $325,000 in punitive damages. The trial court then reconsidered the award and raised it to $525,000 after being persuaded to consider additional attorney

fees. Although the trial court stated on the record that it was not awarding attorney fees, the punitive damages award is very close to the amount of attorney fees and expenses incurred by Lowe, which was reported to be $506,659.78.

The appellate court reviewed the award and found it to be unconstitutionally excessive. It thus reduced the award to $325,000, the amount originally granted by the trial court. In doing so, the appellate court acknowledged that the ratio between actual and punitive damages was in the double-digit range, but concluded that the ratio was appropriate because Lowe's reputation was injured and a small amount of compensatory damages was awarded. *Lowe III*, 358 Ill.App.3d at 1044-45, 295 Ill.Dec. 344, 832 N.E.2d 495. The appellate court relied on three cases to support the proposition that higher ratios in the double-digit range are appropriate where the amount of compensatory damages is minimal. In *Routh Wrecker Service, Inc. v. Washington*, 335 Ark. 232, 980 S.W.2d 240 (1998), the court approved a 75 to 1 ratio where the plaintiff was awarded only $1,000 in compensatory damages. Similarly, in *Deters v. Equifax Credit Information Services, Inc.*, 202 F.3d 1262 (10th Cir.2000), the court upheld a 59 to 1 ratio where the plaintiff was awarded $5,000 in compensatory damages. Finally, in *Jones v. Rent-A-Center, Inc.*, 281 F.Supp.2d 1277 (D.Kan.2003), the court upheld a 29 to 1 ratio where the plaintiff was awarded $10,000 in punitive damages.

We find the court's reliance on these cases to be misplaced. A review of the facts of those cases demonstrates that the high, double-digit ratios awarded to the parties were less the result of small

compensatory damages awards and more the result of particularly egregious conduct which caused the plaintiffs great personal harm. For example, in *Routh*, the court awarded punitive damages that were 75 times higher than compensatory damages after hearing evidence demonstrating that the defendant wrongfully accused the plaintiff of stealing a car from the defendant's business and then swore out an affidavit for an arrest warrant knowing that the plaintiff did not steal the car. The plaintiff was subsequently arrested at his place of employment, handcuffed, booked and placed in a cell. The defendant did not drop the charges, but pursued them until they were ultimately dropped by the prosecution. *Routh*, 335 Ark. at 236, 980 S.W.2d at 242. The plaintiff was not only humiliated, he also suffered emotional and physical distress, including headaches and dramatic weight loss. *Routh*, 335 Ark. at 241, 980 S.W.2d at 244. The court concluded that the ratio of compensatory damages to punitive damages of 75 to 1 was appropriate in that case because the defendant's egregious and reprehensible conduct resulted in "extreme psychological pressure and turmoil."*Routh*, 335 Ark. at 242, 980 S.W.2d at 245.

Likewise, in both *Deters* and *Jones*, the plaintiffs were victims of extreme acts of sexual harassment in their respective workplaces. The *Deters* court found the 59 to 1 ratio of compensatory to punitive damages to be appropriate in light of the "particularly egregious" conduct of the defendants. *Deters*, 202 F.3d at 1273. The court added that a greater ratio is appropriate in cases where the injury suffered is "primarily personal" and noted that punitive damages awards are available in sexual harassment cases even in the total absence of compensatory damages. *Deters*, 202 F.3d at 1273.

Relying on the rationale in *Deters*, the *Jones* court upheld a ratio of 29 to 1, citing the "personal" nature of the injury sustained by the plaintiff. *Jones*, 281 F.Supp.2d at 1289-90.

The Union's conduct in the instant case is not comparable to the conduct of the defendants in *Routh*, *Deters* and *Jones*. Here, Lowe did not suffer a physical or emotional injury, and the injury sustained was not of a personal nature, as a corporation cannot be personally affronted. Lowe's injury cannot be compared to the humiliation suffered by individuals who endure sexual harassment in the workplace, and is also not comparable to the injury sustained by an individual who is arrested at his workplace for a crime he did not commit, handcuffed, and placed in a cell. While ratios ranging from 75 to 1 to 29 to 1 may have been appropriate under those circumstances, we cannot conclude that a ratio in that range is appropriate here where the Union's conduct was much less egregious.

We recognize that low compensatory damages awards may support higher ratios where a particularly egregious act has resulted in a small amount of economic damage, or where an injury is hard to detect and the harm is difficult to determine. See *Gore*, 517 U.S. at 582, 116 S.Ct. at 1602, 134 L.Ed.2d at 831; *State Farm*, 538 U.S. at 425, 123 S.Ct. at 1524, 155 L.Ed.2d at 606. In our estimation, the best way to determine whether a given ratio is appropriate is to compare it to punitive damages awards in other, similar cases. See *Romanski v. Detroit Entertainment, L.L.C.*, 428 F.3d 629, 646 (6th Cir.2005). The parties have not cited a case squarely on point with the one before us, but we have found cases which provide some guidance on this issue.

In *Argentine v. United Steelworkers of America*, 287 F.3d 476 (6th Cir.2002), the plaintiffs were elected officers of their union. They stridently criticized the defendant's conduct during contract negotiations and were thus removed from their positions by the defendant without due process. The defendant accused the plaintiffs of mishandling the union's funds and usurped the plaintiffs' elected authority without proper notice and hearing. The plaintiffs were awarded $9,406 in compensatory damages and $400,000 in punitive damages. The defendant argued that the punitive damages award was excessive under *Gore*. The court determined that the defendant's conduct was reprehensible because the defendant acted deliberately to violate the plaintiffs' free speech rights and harm their reputations for the defendant's own benefit. The court concluded that, although the compensatory damages were small "and without a ready monetary value," a ratio of 42.5 to 1 was reasonable. *Argentine*, 287 F.3d at 488.

In *Turner*, a case recently decided by our appellate court, the plaintiff was awarded $25,000 in compensatory damages for property stolen from her when her car was wrongfully repossessed by the defendant and $500,000 in punitive damages. The facts demonstrated that the defendant had a "systemwide" problem in its bill tracking system, and that it ignored the problem despite being aware that the system was only 50% accurate. The defendant's conduct resulted in "multiple wrongful repossessions" throughout a one-year period. *Turner*, 363 Ill.App.3d at 1155, 300 Ill.Dec. 927, 845 N.E.2d 816. The plaintiff's car was wrongfully repossessed and she lost $25,000 worth of equipment which she stored in her car as a result. The plaintiff

tried, with assistance of counsel, to obtain reimbursement from the defendant for these stolen items for nearly two years before she filed suit. During that time, even though plaintiff was able to provide documentation showing that she had paid off her car loan in full, the defendant reported her to three major credit bureaus and continued to report her for 3 ½ years.

3. Sanctions for Comparable Misconduct

Gore instructs us to consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. See *Gore*, 517 U.S. at 583, 116 S.Ct. at 1603, 134 L.Ed.2d at 831; State Farm, 538 U.S. at 428, 123 S.Ct. at 1526, 155 L.Ed.2d at 607-08. The purpose of this guidepost is to " 'accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue.' " *Gore*, 517 U.S. at 583, 116 S.Ct. at 1603, 134 L.Ed.2d at 831, quoting *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301, 109 S.Ct. 2909, 2934, 106 L.Ed.2d 219, 254 (1989) (Brennan, J., concurring, joined by Marshall, J.). It is uncontested that no comparable Illinois law imposes a civil penalty, such as a fine, for defamation. As the legislature has not spoken on this issue, it is not necessary for us to further consider this guidepost. See *State Farm*, 538 U.S. at 428, 123 S.Ct. at 1526, 155 L.Ed.2d at 608; see also *Turner*, 363 Ill.App.3d at 1164-65, 300 Ill.Dec. 927, 845 N.E.2d 816 ("Neither party has presented any cases or statutes regarding this factor that are comparable in a meaningful sense to this case, nor is this court aware of

any such cases or statutes. Accordingly, this guidepost is of minimal value in our assessment").

Before fashioning a punitive damages award in this case, we take note of the observations of the Seventh Circuit set forth in *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir.2003). There, the court pointed out several considerations that should be made in determining an appropriate compensatory to punitive damages ratio that are relevant to the case at bar. Specifically, the court cautioned that compensatory damages do not always "do the trick" in cases where the harm is *490 largely dignatory because these damages may be too slight to give the victim an incentive to sue and are insufficient to deter and punish the defendant. *Mathias*, 347 F.3d at 677. Further, the court noted that an award of punitive damages can prevent a defendant from profiting from wrongful conduct. *Mathias*, 347 F.3d at 677. Finally, the court considered whether a defendant's wealth enables it to mount an extremely aggressive defense, making litigation too costly for a plaintiff and making it difficult for a plaintiff to find a lawyer willing to handle an involved case for modest stakes. *Mathias*, 347 F.3d at 677.

In addition to these considerations, we acknowledge that we are permitted to take into account the amount of the attorney fees expended in a case when assessing a punitive damages award. *Lowe II*, 327 Ill.App.3d at 724-25, 262 Ill.Dec. 195, 765 N.E.2d 21, citing *E.J. McKernan Co. v. Gregory*, 252 Ill.App.3d 514, 535-36, 191 Ill.Dec. 391, 623 N.E.2d 981 (1993). We also consider the need to achieve the goals of punishment and deterrence. *Gore*, 517 U.S. at 568, 116

S.Ct. at 1595, 134 L.Ed.2d at 822; *State Farm*, 538 U.S. at 416, 123 S.Ct. at 1519, 155 L.Ed.2d at 600; *O'Neill*, 329 Ill.App.3d at 1178-79, 263 Ill.Dec. 898, 769 N.E.2d 100.

With all of these principles in mind, we hold that a punitive damages award of $325,000, at a ratio of approximately 75 to 1, is unconstitutionally excessive in light of the Union's conduct in the instant case. We find that an award of punitive damages against the Union in the amount of $50,000, for a double-digit ratio of approximately 11 to 1, would be reasonable and constitutional. As our analysis demonstrates, the Union's conduct was minimally reprehensible, and the appellate court's award of punitive damages far exceeded awards given in other cases where the conduct exhibited was much more egregious. Furthermore, Lowe did not present evidence demonstrating that it sustained any injury to its reputation that extended beyond its strained and ultimately reconciled relationship with FAMCO. We cannot presume such damage, as the evidence does not warrant it. Indeed, the evidence shows that Lowe was a nonunion company paying less than the prevailing wage from 1969 until 1988. While Lowe's business decisions in this regard have no bearing on the issue before us, it stands to reason that companies that did business with Lowe were aware of its practices, and remained Lowe customers nonetheless.

We recognize that the $50,000 awarded here does not come close to covering the attorney fees and costs which were incurred throughout the duration of this protracted litigation. While attorney fees can be considered when awarding punitive damages, it is not

within the purview of this court to award such fees outright, nor should they be awarded under the guise of a punitive damages award. *E.J. McKernan Co.*, 252 Ill.App.3d at 546, 191 Ill.Dec. 391, 623 N.E.2d 981; *Anderson v. Ferris*, 128 Ill.App.3d 149, 156, 83 Ill.Dec. 392, 470 N.E.2d 518 (1984). We have considered the cost of the litigation, as well as the goals of punishment and deterrence in fashioning the punitive damages award, and even after making those considerations, we find an award of $50,000 to be appropriate.

B. Fairness

The Union argues that any amount of punitive damages awarded to Lowe in the instant case is unconstitutional because the Union lacked notice that it was at risk for such a severe punishment. The Union maintains that no other court has imposed liability for defamation based on false picketing and, therefore, the Union did not have fair notice that its conduct could result in a punitive damages award. The Union failed to raise this claim of unfairness below, and raises it for the first time in this appeal. Accordingly, it is forfeited. *Marshall v. Burger King Corp.*, 222 Ill.2d 422, 430-31, 305 Ill.Dec. 897, 856 N.E.2d 1048 (2006). However, we note that, even if we were to consider this claim, it would be deemed meritless, as it is well established that punitive damages can be awarded in defamation cases where a party, acting with actual malice, publishes false information about a person or entity. *Bryson v. News America Publications, Inc.*, 174 Ill.2d 77, 109-10, 220 Ill.Dec. 195, 672 N.E.2d 1207 (1996); *Edwards v. Paddock Publications, Inc.*, 327 Ill.App.3d 553, 566, 261 Ill.Dec. 358, 763 N.E.2d 328 (2001); *Krasinski v. United Parcel Service, Inc.*, 208 Ill.App.3d

771, 773, 153 Ill.Dec. 148, 566 N.E.2d 998 (1991); *Winters v. Greeley*, 189 Ill.App.3d 590, 599, 136 Ill.Dec. 898, 545 N.E.2d 422 (1989).

III. Lowe's Claims

As previously stated, Lowe asserts in its cross-appeal that the punitive damages award of $325,000 fashioned by the appellate court was deficient and should be increased. We decline to address this claim in light of our decision herein.

CONCLUSION

For the reasons stated, we reverse the judgment of the appellate court and affirm the judgment of the circuit court as modified by a reduction in the award of punitive damages from $325,000 to $50,000.

Appellate court judgment reversed; circuit court judgment affirmed as modified.

CHIEF JUSTICE THOMAS took no part in the consideration or decision of this case.

JUSTICE GARMAN, dissenting:

Because I believe the majority's decision in this case does not adequately vindicate the goals of punitive damage awards, I respectfully dissent. While the majority cites the goals of punishment and deterrence as informing its punitive award against the union, the resulting award of $50,000 does not achieve the purpose of those goals.

I agree with the majority's analysis and consideration of the guideposts for reviewing the constitutionality of an award of punitive damages set forth in *Gore* and further developed in *State Farm. State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 418, 123 S.Ct. 1513, 1520, 155 L.Ed.2d 585, 601 (2003), citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S.Ct. 1589, 1598-99, 134 L.Ed.2d 809, 826 (1996). These guideposts are "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm*, 538 U.S. at 418, 123 S.Ct. at 1520, 155 L.Ed.2d at 601. In considering these guideposts courts must keep in mind the underlying goals of punitive awards.

An award of punitive damages serves "to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *Gore*, 517 U.S. at 568, 116 S.Ct. at 1595, 134 L.Ed.2d at 822; *State Farm*, 538 U.S. at 416, 123 S.Ct. at 1519, 155 L.Ed.2d at 600. Punitive damages have been described as "private fines," intended to deter future wrongdoing as well as punish a defendant. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432, 121 S.Ct. 1678, 1683, 149 L.Ed.2d 674, 684 (2001). Not surprisingly, fashioning appropriate punitive awards in furtherance of these goals can be difficult in certain situations.

Here, defendant's conduct was reprehensible based upon the fact that it was intentional and malicious. However, defendant's conduct of false picketing, while malicious, was not nearly as egregious as sexual harassment or wrongful prosecution. *Deters v. Equifax Credit Information Services, Inc.*, 202 F.3d 1262 (10th Cir.2000) (sexual harassment); *Jones v. Rent-A-Center, Inc.*, 281 F.Supp.2d 1277 (D.Kan.2003) (sexual harassment); *Routh Wrecker Service, Inc. v. Washington*, 335 Ark. 232, 980 S.W.2d 240 (1998) (defendant wrongfully accused and swore out an arrest warrant against plaintiff for a crime he did not commit). Moreover, the award by the appellate court would result in disparity between the compensatory damages suffered by plaintiff and the punitive damages awarded at a ratio of almost 75 to 1. These facts do not end the analysis, however. In fact, the majority acknowledges that there is no bright-line ratio to follow when considering the disparity between the actual harm suffered by a plaintiff and the punitive damages awarded and explains that courts have considered a variety of other factors in fashioning punitive awards. Op. 225 Ill.2d at 484-85, 489-91, 312 Ill.Dec. at 254-55, 258, 870 N.E.2d at 319-20, 323. Despite this, the majority focuses too greatly on the size of the ratio, fails to adequately utilize the other factors courts consider in fashioning punitive awards, and loses sight altogether of the underlying goals of punitive damages.

While the United State Supreme Court has stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages * * * will satisfy due process," there is no bright-line ratio and courts consider a variety of factors when departing from single-digit ratios. *State Farm*, 538 U.S. at 425,

123 S.Ct. at 1524, 155 L.Ed.2d at 605-06. Where compensatory damages are inadequate to give victims any incentive to sue and thus insufficient to deter and punish defendants, punitive awards with high ratios are more appropriate. *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 676-77 (7th Cir.2003). Such awards are also more appropriate where a defendant's wealth enables it to mount such an extremely aggressive defense that plaintiffs never bring suits in the first place. *Mathias*, 347 F.3d at 677. In these situations the extreme litigation costs imposed by the defendant's practices and the potential difficulty these costs impose on a plaintiff's ability to find a lawyer willing to fight in a case of modest stakes make high-ratio punitive awards more appropriate. *Mathias*, 347 F.3d at 677. Similarly, high-ratio awards are more appropriate where the attorney fees expended in a case are especially great. *Lowe Excavating Co. v. International Union of Operating Engineers Local No. 150*, 327 Ill.App.3d 711, 724-25, 262 Ill.Dec. 195, 765 N.E.2d 21 (2002), citing *E.J. McKernan Co. v. Gregory*, 252 Ill.App.3d 514, 535-36, 191 Ill.Dec. 391, 623 N.E.2d 981 (1993).

While the majority identifies these factors, it does not appear to actually utilize them in concluding that a punitive damages award of $325,000, at a ratio of approximately 75 to 1, is unconstitutionally excessive, while an award of $50,000, at a ratio of 11 to 1, is reasonable and constitutional. Although the majority's analysis and resulting 11 to 1 ratio award make clear its belief that this is a situation where an award exceeding a single-digit ratio between punitive and compensatory damages meets the requirements of due process, the majority's $50,000 award is not sufficient to achieve the

punishment and deterrence purposes of punitive awards. Simply providing any double-digit ratio does not prove, in and of itself, an appropriate consideration of all the factors courts must utilize in finally setting an award.

This case has been going on since February 17, 1988, when plaintiff first filed suit. The compensatory damages plaintiff was able to establish amounted to only $4,680. Its attorney fees were much greater. When plaintiff filed its original motion for punitive damages on August 15, 2003, it attached affidavits of its company president as well as its attorneys. The company president's affidavit provided that plaintiff had, at that point, paid $225,925.83 in fees and expenses on the case. The attorneys' affidavits provided that fees and expenses actually totaled over $500,000.

These facts make evident that this is a situation where, under similar circumstances, compensatory damages may be too inadequate to give a victim an incentive to sue in the first place, and thus insufficient to punish and deter a defendant. Additionally, this case provides a strong example of a situation where, without a significant punitive award, extreme litigation costs could make it difficult for a plaintiff to find a lawyer willing to fight for such modest stakes. In fact, in making its findings concerning punitive awards, the trial court in this case specifically stated that it considered "the small amount of actual damages awarded to the Plaintiff, the additional harm to the Plaintiff caused by the Defendant's actions which caused the Plaintiff to be involved in protracted litigation and to expend substantial amounts for

attorney's fees." Finally, the attorney fees expended by plaintiff in this case are unquestionably high.

Considering the above, and despite the flaws identified by the majority in the appellate court's analysis of the *Gore* and *State Farm* factors, I do not feel that a punitive award of $50,000 goes far enough. While an award of $325,000 leads to a high ratio between punitive and compensatory damages, it does provide an amount truly informed by the facts of this case and the underlying goals of punitive damages. Like the majority, I would therefore not strictly adhere to a single-digit ratio. Having found this a situation appropriate for a double-digit award ratio, I would go further than the majority to appropriately punish defendant for its intentionally malicious conduct as well as deter it and others from considering similar courses of conduct in the future. Similarly situated potential plaintiffs must know that they will receive adequate compensation to justify filing suit in these types of cases, or to offset the extreme litigation costs occasioned by overly and wrongfully aggressive defendants. Upholding the appellate court's punitive damages award of $325,000 would accomplish these tasks and truly reflect a consideration of the factors which courts utilize in fashioning high-ratio punitive to compensatory awards.

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

May 29, 2007

Mr. Michael E. Avakian
Center on Natl. Labor Policy, Inc.
5211 Port Royal Road, suite 103
North Springfield, VA 22151

No. 101231- Cons. 102347

International Union of Operating Engineers, Local 150, et al., appellants/cross-appellees, v. Lowe Excavating Co. et al., appelleees/cross-appellants.

Appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on July 3, 2007.

Thomas, C.J. took no part.

Appellate Court of Illinois, Second District.

LOWE EXCAVATING COMPANY, Plaintiff-Appellee and Cross-Appellant,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL NO. 150, Defendant-Appellant and Cross-Appellee.

No. 2-04-0145.

July 8, 2005.

Rehearing Denied Aug. 10, 2005.

Justice GILLERAN JOHNSON delivered the opinion of the court:

The defendant, International Union of Operating Engineers Local No. 150 (the Union), appeals from the January 12, 2004, and April 16, 2004, orders of the circuit court of McHenry County awarding the plaintiff, Lowe Excavating Co., $525,000 in punitive damages. On appeal, the Union argues that punitive damages were inappropriate and, alternatively, that the amount awarded was excessive. Lowe Excavating cross-appeals from these same orders, arguing that the amount awarded was inadequate.

I. BACKGROUND

The facts of the present case are well known by the parties and this court. Therefore, we present a brief outline of the procedural history of this case and dispense with a lengthy recitation of the facts. Any additional necessary information will be included in the discussion portion of our disposition.

In February 1988, the defendant began picketing one of the plaintiff's jobsites with placards stating:

"NOTICE TO THE PUBLIC LOWE EXCAVATING DOES NOT PAY THE PREVAILING WAGES AND ECONOMIC BENEFITS FOR OPERATING ENGINEERS WHICH ARE STANDARD IN THE AREA

OUR DISPUTE CONCERNS ONLY SUBSTANDARD WAGES AND BENEFITS PAID BY THIS COMPANY LOCAL 150

International Union of Operating Engineers, AFL-CIO"

On February 17, 1988, Lowe Excavating initiated a cause of action. It its first complaint, Lowe Excavating alleged a cause of action for tortious interference with a prospective economic advantage. Lowe Excavating sought injunctive and monetary relief. Lowe Excavating later amended its complaint to allege causes of action for trade libel, tortious interference with a contractual relationship, tortious interference with a prospective economic advantage, and negligent interference with a contract. On October 11, 1988, the trial court denied Lowe Excavating's request for an injunction as being preempted by federal

law. On interlocutory appeal, this court reversed the trial court's decision, determining that federal preemption did not apply. We remanded for a hearing. See *Lowe Excavating Co. v. International Union of Operating Engineers Local No. 150*, 180 Ill.App.3d 39, 129 Ill.Dec. 300, 535 N.E.2d 1065 (1989) (hereinafter *Lowe I*).

On April 2, 2000, this matter proceeded to a bench trial. On October 19, 2000, the trial court found in favor of the Union on all counts. Lowe Excavating appealed. On appeal, this court reversed the ruling of the trial court, finding that Lowe Excavating had proved its cause of action for trade libel. This court found that the Union's statements were false and were made with actual malice. We remanded the cause and instructed the trial court to determine whether punitive damages were appropriate. We also instructed the trial court to consider Lowe Excavating's attorney fees in the event that it awarded punitive damages. See *Lowe Excavating Co. v. International Union of Operating Engineers Local No. 150*, 327 Ill.App.3d 711, 262 Ill.Dec. 195, 765 N.E.2d 21 (2002) (hereinafter *Lowe II*).

On August 15, 2003, upon remand and direction from this court, Lowe Excavating filed a motion seeking punitive damages. Lowe Excavating attached to its motion the affidavits of Marshall Lowe, the president of Lowe Excavating, and Gerard Smetana and Michael Avakian, attorneys for Lowe Excavating. Smetana's affidavit provided that his firm had expended 1,288 billable hours totaling $304,101.62 on the case. Avakian's affidavit provided that his firm had expended 843 billable hours totaling $194,350 on the

case. Avakian's firm had also expended $8,108.16 in various expenses. Lowe's affidavit provided that his company had thus far paid $225,925.83 in fees and expenses on the case.

On January 12, 2004, the trial court entered an order awarding Lowe Excavating $325,000 in punitive damages. The trial court explained its rationale in fashioning the amount of the award:

> "3. The imposition of punitive damages against the [d]efendant is justified in this case because the appellate court found that the evidence in this case established that the [d]efendant's actions constituted actual malice.* * *
>
> * * *
>
> 6. Considering the evidence in this case, the Court believes that *1038 punitive damages should be awarded to deter defendant and others from similar conduct in the future. Specifically, the [c]ourt is referring to the conduct delineated by the Appellate Court on [327 Ill.App.3d] pages 722 and 723 [262 Ill.Dec. 195, 765 N.E.2d 21] of *LOWE II*.
>
> 7. The amount of actual damages in the case is small, $4,680, but there is evidence that the [p]laintiff has incurred substantial attorney's fees and expenses in this protracted litigation. In an affidavit from Marshal Lowe dated August 13, 2003, Marshall Lowe stated that the Lowe Excavating Company had actually paid $225,925.83 in attorney's fees and expenses [and] that further fees

and expenses had been incurred, but not yet paid. * * *

8. Additionally, there has been an affidavit submitted by Attorney Gerard C. Smetana dated August 13, 2003 and Attorney Michael E. Avakian dated August 14, 2003 which reflect time records of billable hours and attorney fee hourly rate [*sic*] showing $301,104.62 and $194,350.00 respectively for these two attorneys. According to the affidavit of Attorney Avakian, the $194,350.00 in attorney fees plus expenses were not paid by the [p]laintiff, but were incurred by an entity identified as 'the Center on National Labor Policy, Inc.' which entity is not a party to this lawsuit. There is no indication that the [p]laintiff is responsible for payment of the $194,350.00 in attorney's fees plus expenses.

9. While the [c]ourt is considering [p]laintiff's attorney's fees as directed by the Appellate Court, this Court is not awarding attorney's fees, but is considering [p]laintiff's attorney's fees as a factor in the assessing of punitive damages."

On January 20, 2004, Lowe Excavating filed a posttrial motion entitled "Plaintiff's Motion for Partial Reconsideration and Modification of Order on Punitive Damages." On February 9, 2004, before the trial court ruled on Lowe Excavating's motion for reconsideration, the Union filed a notice of appeal. On February 19, 2004, Lowe Excavating filed its notice of cross-appeal.

On February 24, 2004, the trial court conducted a hearing on Lowe Excavating's posttrial motion. The trial court granted the motion and increased Lowe

Excavating's award of punitive damages by $200,000, from $325,000 to $525,000. The trial court explained that it was now taking into account the fees billed by Attorney Avakian, notwithstanding the fact that those fees were incurred by the Center on National Labor Policy. Thereafter, on March 5, 2004, the Union filed a posttrial motion entitled "Local 150's Motion for Reconsideration of Punitive Damage Awards," to which, on March 26, 2004, Lowe Excavating responded. On April 16, 2004, the trial court made its final ruling on the matter. It denied the Union's motion to reconsider.

On November 18, 2004, this court dismissed the appeal and cross-appeal because the parties' notices of appeal were filed prematurely, before the trial court had disposed of Lowe Excavating's pending posttrial motion. On March 30, 2005, the Illinois Supreme Court entered a supervisory order directing us to reinstate the appeals and consider the case on the merits. In compliance with the supreme court's directive, we discuss the merits of the parties' appeals.

II. DISCUSSION

On appeal, the Union's two primary arguments are that (1) punitive damages should not have been imposed; and (2) the amount of punitive damages awarded was excessive. We first address the Union's contention that punitive damages were not appropriate in this case.

Punitive damages may be awarded when torts are committed with fraud, actual malice, or deliberate violence or oppression, or when the defendant acts

willfully or with such gross negligence as to indicate a wanton disregard for others. *Martin v. Heinold Commodities, Inc.*, 163 Ill.2d 33, 80-81, 205 Ill.Dec. 443, 643 N.E.2d 734 (1994), citing *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 186, 23 Ill.Dec. 559, 384 N.E.2d 353 (1978). Punitive damages are similar to criminal penalties. *Proctor v. Davis*, 291 Ill.App.3d 265, 285, 225 Ill.Dec. 126, 682 N.E.2d 1203 (1997). The purpose of punitive damages is to punish the defendant for his reprehensible conduct and to deter the defendant and others from committing like offenses. *Franz v. Calaco Development Corp.*, 352 Ill.App.3d 1129, 1137, 288 Ill.Dec. 669, 818 N.E.2d 357 (2004); *Kemner v. Monsanto Co.*, 217 Ill.App.3d 188, 198, 160 Ill.Dec. 192, 576 N.E.2d 1146 (1991). Because of their penal nature, punitive damages are not favored in the law, and courts must be cautious in seeing that they are not improperly or unwisely awarded. *Cruthis v. Firstar Bank, N.A.*, 354 Ill.App.3d 1122, 1133, 290 Ill.Dec. 869, 822 N.E.2d 454 (2004).

Review of a trial court's decision to award punitive damages following a bench trial is generally threefold. *Franz*, 352 Ill.App.3d at 1137, 288 Ill.Dec. 669, 818 N.E.2d 357. The first step is whether punitive damages are available as a matter of law for the particular cause of action. *Franz*, 352 Ill.App.3d at 1137, 288 Ill.Dec. 669, 818 N.E.2d 357. This question is reviewed *de novo*. *Franz*, 352 Ill.App.3d at 1137, 288 Ill.Dec. 669, 818 N.E.2d 357. The next step is whether the defendant acted fraudulently, maliciously, or in some other outrageous manner such as to warrant punitive damages. *Franz*, 352 Ill.App.3d at 1137-38, 288 Ill.Dec. 669, 818 N.E.2d 357. This question is one of fact and is reviewed against the manifest weight of the

evidence. *Franz*, 352 Ill.App.3d at 1138, 288 Ill.Dec. 669, 818 N.E.2d 357. Finally, the trial court's ultimate decision to impose punitive damages is reviewed for an abuse of discretion. *Franz*, 352 Ill.App.3d at 1138, 288 Ill.Dec. 669, 818 N.E.2d 357.

We now apply these principles to the instant case. As to the first step, we note that our supreme court has not explicitly determined whether punitive damages are available as a matter of law in a defamation action. See *Bryson v. News America Publications, Inc.*, 174 Ill.2d 77, 110, 220 Ill.Dec. 195, 672 N.E.2d 1207 (1996). However, several appellate court cases have determined that punitive damages are available in such an action. See *Krasinski v. United Parcel Service, Inc.*, 208 Ill.App.3d 771, 773, 153 Ill.Dec. 148, 566 N.E.2d 998 (1991); *Moore v. Streit*, 181 Ill.App.3d 587, 592, 130 Ill.Dec. 341, 537 N.E.2d 408 (1989); *Brown v. Farkas*, 158 Ill.App.3d 772, 780, 110 Ill.Dec. 823, 511 N.E.2d 1143 (1986). In light of these cases, we hold that punitive damages may be awarded in a defamation action.

We need not undertake the second step. In *Lowe II*, this court found that the Union had acted with actual malice. This is now the "law of the case." The law-of-the-case doctrine provides that an issue of law decided on appeal is binding on the circuit court on remand and on the appellate court on subsequent appeal. *Continental Insurance Co. v. Skidmore, Owings & Merrill*, 271 Ill.App.3d 692, 696, 208 Ill.Dec. 37, 648 N.E.2d 959 (1995).

> " 'Where the Appellate Court * * * on the first appeal to it, announces a particular view of the law

> governing the case and reverses and remands the case for further proceedings in accordance with the views announced, if the case is again brought before such court for review the former decision is binding on the court making it, and the questions decided and determined by it on the first appeal are not open for re-consideration on the second appeal.' " *PSL Realty Co. v. Granite Investment Co.*, 86 Ill.2d 291, 312, 56 Ill.Dec. 368, 427 N.E.2d 563 (1981), quoting *Zerulla v. Supreme Lodge Order of Mutual Protection*, 223 Ill. 518, 520, 79 N.E. 160 (1906).

There are two exceptions to the law-of-the-case doctrine, neither of which applies here. "The first exception is when a higher reviewing court, subsequent to the lower reviewing court's decision, makes a contrary ruling on the same issue." *Martin v. Federal Life Insurance Co.*, 268 Ill.App.3d 698, 701, 205 Ill.Dec. 826, 644 N.E.2d 42 (1994). The second exception allows a reviewing court to depart from its previous decision if it finds that it was palpably erroneous, but only if the cause was remanded for a new trial on all the issues. *Martin*, 268 Ill.App.3d at 701, 205 Ill.Dec. 826, 644 N.E.2d 42. The rationale of this second exception is that the appellate court, on the second appeal, would be reaching a different decision based on a new and different trial. *Martin*, 268 Ill.App.3d at 701, 205 Ill.Dec. 826, 644 N.E.2d 42. Because neither of these exceptions is applicable, we proceed directly to the third step.

We do not find that the trial court's decision to award punitive damages in this case was an abuse of discretion. As noted above, punitive damages are penal in nature and serve the purposes of punishment and

specific and general deterrence. *Franz*, 352 Ill.App.3d at 1137, 288 Ill.Dec. 669, 818 N.E.2d 357. The record here reveals that the trial court considered the evidence and arguments offered by both parties and, after doing so, imposed punitive damages upon the Union for appropriate reasons. Particularly, the trial court found that punitive damages were necessary to punish the Union for its malicious conduct and to deter the Union and others from committing similar conduct in the future. Because punitive damages were imposed for appropriate reasons, we decline to disturb the trial court's decision to impose them.

The Union's next contention on appeal is that the trial court's punitive damages award was excessive. The Union first asserts a common-law challenge that the award was excessive. The Union next poses a constitutional challenge that the award was excessive. We will start with the Union's common-law challenge.

Following a bench trial, a reviewing court examines the trial court's computation of punitive damages, applying an abuse-of-discretion standard. *Franz*, 352 Ill.App.3d at 1138, 288 Ill.Dec. 669, 818 N.E.2d 357. Relevant factors a trial court may consider in fashioning its award are the nature and enormity of the wrong, the financial status of the defendant, and the potential liability of the defendant. *Black v. Iovino*, 219 Ill.App.3d 378, 393, 162 Ill.Dec. 513, 580 N.E.2d 139 (1991). These factors are not exclusive, and in fact, each case should be judged by its own unique set of facts. *Black*, 219 Ill.App.3d at 393, 162 Ill.Dec. 513, 580 N.E.2d 139; *E.J. McKernan Co. v. Gregory*, 252 Ill.App.3d 514, 536, 191 Ill.Dec. 391, 623 N.E.2d 981 (1993). Illinois law permits a trial court to consider the

opposing parties' attorney fees in fashioning a punitive damages award. See Lowe II, 327 Ill.App.3d at 725, 262 Ill.Dec. 195, 765 N.E.2d 21; *E.J. McKernan Co.*, 252 Ill.App.3d at 536, 191 Ill.Dec. 391, 623 N.E.2d 981. Nonetheless, because the calculation of punitive damages is a matter of trial court discretion, a reviewing court may not alter the award unless it is the result of " 'passion, partiality or corruption.' " *Levy v. Markal Sales Corp.*, 268 Ill.App.3d 355, 379, 205 Ill.Dec. 599, 643 N.E.2d 1206 (1994), quoting *Deal v. Byford*, 127 Ill.2d 192, 204, 130 Ill.Dec. 200, 537 N.E.2d 267 (1989); *E.J. McKernan Co.*, 252 Ill.App.3d at 536, 191 Ill.Dec. 391, 623 N.E.2d 981.

We do not find that the trial court abused its discretion in calculating the award. Nothing in the record suggests that the trial court's award was the product of passion, partiality, or corruption. In fashioning its award, the trial court carefully considered the nature and enormity of the wrong and attempted to fashion an amount sufficient to deter the Union and others from committing similar offenses in the future. The trial court also took into account attorney fees that were incurred by Lowe Excavating in prosecuting its claim.

The Union points out that the trial court also considered attorney fees that were generated by Lowe Excavating's three unsuccessful claims and fees that were incurred by the Center on National Labor Policy. The Union argues that considering the attorney fees generated from the unsuccessful claims and incurred by a third party was error. We disagree that the trial court's consideration of all the attorney fees in this case resulted in common-law error.

In multiple-count law suits such as the case at hand, attorney fees and costs generated on the various counts are often very intertwined and difficult, if not impossible, to separate. With respect to the attorney fees incurred by the third party, we agree with the trial court that they were relevant. Even though they were not paid for by Lowe Excavating, they were still incurred by someone. It is important to keep in mind that the trial court's award of punitive damages was not an award of attorney fees and was not fashioned to compensate Lowe Excavating for its attorney fees. The punitive damages award was fashioned to punish the Union and deter the Union and others. Attorney fees were merely one factor the trial court considered in fashioning the award. See *Hazelwood v. Illinois Central Gulf R.R.*, 114 Ill.App.3d 703, 711-12, 71 Ill.Dec. 320, 450 N.E.2d 1199 (1983).

We are now brought to the Union's argument that the punitive damages awarded were unconstitutionally excessive. Even though the trial court's award withstands the Union's common-law challenge, the award must still pass constitutional muster as explained in the United States Supreme Court cases, *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). In *Gore*, the Supreme Court proclaimed that grossly excessive punitive damages were unconstitutional, in violation of the due process clause of the fourteenth amendment to the United States Constitution. *Gore*, 517 U.S. at 562, 116 S.Ct. at 1592, 134 L.Ed.2d at 818. The *Gore* Court instructed courts reviewing punitive damages awards to consider three

guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages award and the civil penalties authorized or imposed in comparable cases. *Gore*, 517 U.S. at 575, 116 S.Ct. at 1598, 134 L.Ed.2d at 826. The *Campbell* Court reiterated the principles espoused in *Gore* and further instructed reviewing courts to use the *de novo* standard of review. *Campbell*, 538 U.S. at 418, 123 S.Ct. at 1520, 155 L.Ed.2d at 601.

The most important of the three guideposts is the degree of reprehensibility. *Gore*, 517 U.S. at 575, 116 S.Ct. at 1599, 134 L.Ed.2d at 826; *Campbell*, 538 U.S. at 419, 123 S.Ct. at 1521, 155 L.Ed.2d at 602. Courts should determine the degree of reprehensibility by considering whether: the harm imposed was physical, as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health and safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit. *Gore*, 517 U.S. at 576-77, 116 S.Ct. at 1599, 134 L.Ed.2d at 827; *Campbell*, 538 U.S. at 419, 123 S.Ct. at 1521, 155 L.Ed.2d at 602.

Several factors in this case heighten the degree of reprehensibility of the Union's conduct. First, the target of the Union's conduct, Lowe Excavating, was financially vulnerable. The record reveals that Lowe Excavating is a small excavating contractor. At the point in time in question, Lowe Excavating employed only 16 operators and apprentices combined. Certainly,

reputation is very important to the continued success of a small business, as small businesses thrive on repeat customers and continued relationships. The Union's false allegations against Lowe Excavating were potentially devastating to Lowe Excavating's reputation and could have financially ruined the company. We note that because of the Union's false allegations, the general contractor of the picketed jobsite, FAMCO, removed Lowe Excavating from the project and ceased doing business with Lowe Excavating for a time.

Second, contrary to the Union's argument, the conduct was not isolated. It was repeated. The record reveals that the Union picketed with false information from February 15, 1988, until June 30, 1988, and then again from September 28, 1988, until October 11, 1988. The Union continued to picket even after it was informed that Lowe Excavating was working on a federally funded project and its payroll had been certified and sent to the Department of Labor. Finally, the Union's conduct was the product of intentional malice. As noted above, this court made that determination in *Lowe II*. We reasoned that the Union had been notified that the picketed project was a federally funded project and, thus, that Lowe Excavating had to have been paying prevailing union wages. Additionally, the Union had been notified that Lowe Excavating's payroll had been certified and sent to the Department of Labor. We again decline to alter the law of the case with regard to the malice finding.

We now turn to the second guidepost, the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award. With

regard to this guidepost, the *Campbell* Court instructed that few awards exceeding a single-digit ratio will pass constitutional muster. *Campbell*, 538 U.S. at 425, 123 S.Ct. at 1524, 155 L.Ed.2d at 605-06. The *Campbell* Court encouraged courts to consider awarding double, treble, or even quadruple punitive damages. *Campbell*, 538 U.S. at 425, 123 S.Ct. at 1524, 155 L.Ed.2d at 606. However, the *Campbell* Court instructed that ratios of punitive to compensatory damages of 2 to 1, 3 to 1, and 4 to 1 were not binding. *Campbell*, 538 U.S. at 425, 123 S.Ct. at 1524, 155 L.Ed.-2d at 606.

In fact, the *Campbell* Court provided courts with a caveat that there was no bright-line rule as to whether a punitive damages award was excessive. *Campbell*, 538 U.S. at 425, 123 S.Ct. at 1524, 155 L.Ed.2d at 605. The *Campbell* Court explained:

> "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' *Gore*, 517 U.S. at 582, 116 S.Ct. at 1602, 134 L.Ed.2d at 831; see also *Gore*, 517 U.S. at 582, 134 L.Ed.2d at 831, 116 S.Ct. at 1602] (positing that a higher ratio *might* be necessary where 'the injury is hard to detect or the monetary value of the noneconomic harm might have been difficult to determine'). The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process

> guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harmto the plaintiff." (Emphasis in original.) *Campbell*, 538 U.S. at 425, 123 S.Ct. at 1524, 155 L.Ed.2d at 606.

In sum, the *Campbell* Court carved out several instances where a ratio exceeding 10 to 1 may be appropriate: (1) where a particularly egregious act has resulted in small amount of economic damages; (2) where the injury is hard to detect; and (3) where the monetary value of the harm is difficult to determine. See *Park v. Mobil Oil Guam, Inc.*, No. CVA03-001, 2004 WL 2595897 (Guam November 16, 2004), citing *Campbell*, 538 U.S. at 425, 123 S.Ct. at 1524, 155 L.Ed.2d at 606.

In this case, the ratio of punitive damages, $525,000, to compensatory damages, $4,280, is approximately 115 to 1. Defamation actions, like in the present case, involve injury to reputation. Injury to reputation may result in a small amount of economic damages. The value of such damage is hard to determine. The injury itself is even hard to detect. Thus, we believe that the trial court was justified in exceeding a single-digit ratio. In fact, a punitive damages award in the single-digit ratio would be so paltry in this case that the Union, with all of its assets, would hardly be punished or deterred. That said, we believe that 115 to 1 is an exceedingly disproportionate ratio. Courts in other jurisdictions have struck down similar and even smaller ratios. See *Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 604 S.E.2d 385 (2004) (finding that a ratio of 127 to 1 was constitutionally suspect); *Blust v. Lamar Advertising Co.*, 157 Ohio

App.3d 787, 813 N.E.2d 902 (2004) (finding that a ratio of 70 to 1 was constitutionally suspect); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651 (S.D.2003) (finding that a ratio of 20 to 1 was constitutionally suspect); *Grefer v. Alpha Technical*, 901 So.2d 1117 (La.App. 2005) (finding that a ratio of 18 to 1 was constitutionally suspect).

Given the unique facts of the instant matter, we believe that a ratio in the double-digit range would have been more appropriate than a ratio in the triple-digit range. Courts in other jurisdictions have upheld ratios in the double-digit range, where, as here, the damage was primarily noneconomic and a small amount of compensatory damages was awarded. In *Routh Wrecker Service, Inc. v. Washington*, 335 Ark. 232, 980 S.W.2d 240 (1998), the plaintiff was awarded $1,000 in compensatory and $75,000 in punitive damages on his abuse of process claim. The Arkansas Supreme Court upheld the 75 to 1 ratio, reasoning in part that the defendant's act resulted in only a small amount of economic damages. *Routh*, 335 Ark. at 242, 980 S.W.2d at 245. Similarly, in *Deters v. Equifax Credit Information Services, Inc.*, 202 F.3d 1262 (10th Cir.2000), the plaintiff was awarded $5,000 in compensatory and $290,000 in punitive damages on her sexual harassment claim. The United States Court of Appeals, Tenth Circuit, upheld the 59 to 1 ratio, reasoning that the plaintiff's injury was primarily personal or noneconomic. *Deters*, 202 F.3d at 1272-73. Additionally, in *Jones v. Rent-A-Center, Inc.*, 281 F.Supp.2d 1277 (D.Kan.2003), the plaintiff was awarded $10,000 in compensatory and $290,000 in punitive damages on her sexual harassment claim. The United States District Court, District of Kansas, upheld the

award, citing that the plaintiff's injury was primarily personal and difficult to quantify. *Jones*, 281 F.Supp.2d at 1290.

Finally, we believe that the third guidepost, the disparity between the punitive damages award and the civil penalties authorized in comparable cases, calls for a reduction of the trial court's punitive damages award. In examining other defamation actions in Illinois, this court has been unable to find another award even close to the one-half million dollars awarded here. See, *e.g.*, *Girsberger v. Kresz*, 261 Ill.App.3d 398, 198 Ill.Dec. 940, 633 N.E.2d 781 (1993) (affirming an award of $50,000); *Owens v. CBS, Inc.*, 173 Ill.App.3d 977, 123 Ill.Dec. 521, 527 N.E.2d 1296 (1988) (affirming an award of $280,000).

Taking into account all of the *Gore* and *Campbell* principles, we believe that a reasonable and constitutionally acceptable amount of punitive damages to be awarded in this case is $325,000, the amount that the trial court originally awarded. Although we do not believe that the trial court committed common-law error when it considered the attorney fees generated by the Center on National Labor Policy, we believe that the consideration of those fees resulted in a punitive damages award that violated the Union's right to due process. An award of $325,000 takes into consideration a reasonable amount of attorney fees expended by Lowe Excavating in prosecuting its claim and is ample to punish the Union and deter the Union and others from committing future like acts. Such an award also results in a constitutionally acceptable ratio of approximately 75 to 1.

On a final note, our award in this case is not meant to establish a bright-line ratio by which punitive damages must be set. We reiterate that the constitutional line is not marked by a simple mathematical formula and that each case must be judged according to its particular facts. See *Gore*, 517 U.S. at 568, 116 S.Ct. at 1595, 134 L.Ed.2d at 822; *Campbell*, 538 U.S. at 425, 123 S.Ct. at 1524, 155 L.Ed.2d at 606.

III. CONCLUSION

In sum, we reduce the trial court's award of punitive damages from $525,000 to $325,000, the former amount being unconstitutionally excessive when applying the principles articulated in *Gore* and *Campbell*. In light of this ruling, we need not address Lowe Excavating's contention on cross-appeal that the amount of punitive damages awarded was inadequate.

For the foregoing reasons, the judgment of the circuit court of McHenry County is affirmed as modified.

Affirmed as modified.

BOWMAN and KAPALA, JJ., concur.

IN THE CIRCUIT COURT FOR THE
NINETEENTH JUDICIAL CIRCUIT
MC HENRY COUNTY, ILLINOIS

LOWE EXCAVATING CO.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	No. 88 ch 34
	)	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 150,	)	
	)	
Defendant	)	

ORDER ON PUNITIVE DAMAGES

This cause has been under advisement by the Trial Court on the issue of punitive damages.

In *LOWE EXCAVATING CO. vs. INTERNATIONAL UNION OF OPERATING ENGINEERS*, 327. III App 3d 711 (2nd Dist. 2002) (LOWE II) the Second District Appellate Court reversed this Court's ruling in favor of the Defendant on the Count for Trade Libel and on the exclusion of evidence of Plaintiffs attorney's fees for the purpose of determining punitive damages.

Before the Court at this present time are two preliminary motions and the underlying issue concerning the award of punitive damages. The two preliminary motions are:

1. Plaintiff's Offer of Proof in which the Plaintiff offers an affidavit and documents to prove that the Defendant engaged "in other instances of activities in reckless disregard for the truth since 1988" and in further support to Plaintiffs Motion for Punitive Damages"

2. Local 150's Motion to Strike Plaintiff's Motion for Punitive Damages in which the Defendant requests that the Court strike the Plaintiff's Motion for Punitive Damages and supporting brief as a sanction because the Defendant alleges that the Plaintiffs failure to cite the case of *STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY vs. CAMPBELL*, 123 S. Ct. 1513 (2003) was a violation of Illinois Rule of Professional Conduct 3.3(a) (3).

As to the two preliminary motions, briefing schedules were entered over and above the briefing schedule covering the Plaintiffs Motion for Punitive Damages. The parties agreed to submit the two preliminary motions for decision along with the decision on the punitive damages Issue.

The Court has reviewed all of the written materials presented on all of the matters presently pending, heard the oral arguments and has considered the citations to legal authorities.

Given the age and history of this case, one of the most important aspects to the further disposition of this case is the doctrine of law of the case. The Second District Appellate Court in *REICH vs. GENDREAU*, 308 III App 3d 825, 829 (2nd Dist., 199)[sic] stated the doctrine of the law of the case as follows:

> "Under the law of the case doctrine, issues presented and disposed of in a prior appeal are binding and will control in the Circuit Court on remand as well as in the appellate court in a subsequent appeal. ..."

It is the understanding of the trial court that the Appellate Court in *LOWE EXCAVATING CO. vs. INTERNATIONAL UNION OF OPERATING ENGINEERS, supra* (*LOWE IV)* has made rulings that are the law of the case in this case. Among the rulings that are the law in this case, the Appellate Court has decided that:

1. The statements in issue made by Defendant against the Plaintiff were defamatory. *LOWE II* at page 722.

2. The statements in issue made by the Defendant against the Plaintiff were false. *LOWE II* at page 722.

3. The statements in issue were published by the Defendant against the Plaintiff with actual malice. *LOWE II* at page 723.

As previously stated, the Appellate Court in *LOWE II* reversed this Court's ruling in favor of the Defendant on the trade liable count and further directed that this Court consider evidence of the Plaintiffs Attorney's Fees when considering whether to award punitive damages.

The posture of this case is an outright reversal on the trade libel count and a direction to consider

Plaintiffs attorney's fees for the purposes of determining punitive damages, if awarded. Other than the Plaintiffs attorney's fees, the Appellate Court did not direct the trial court to reopen the proofs. The Appellate Court's instructions were explicit:

> " ... we remand the cause for further proceedings regarding damages." *LOWE II*, at 725.

Having considered all of the written materials presented, and the oral arguments and the citations to legal authorities and further the directions from the appellate court in *LOWE II*, this Court finds as follows:

1. The Plaintiff's Offer of Proof shall be denied because it raises matters beyond the scope of the appellate court's instructions and, to the extent this Court would have discretion to consider the matters, this Court finds the matters were untimely, were materials that the Plaintiff could have discovered and presented at the trial of this case and would unduly prejudice the Defendant at this stage of the proceedings.

2. The Defendant's Motion to Strike Plaintiffs Motion for Punitive Damages should be denied because the Court finds no Rule 3.3(a)(3) violation.

3. The imposition of punitive damages against the Defendant is justified in this case because the appellate court has found that the evidence in the case establishes that the Defendant's actions constituted actual malice. *BROWN &*

WILLIAMSON TOBACCO CORP. vs. JACOBSON, 827 F. 2d 1119,1142 (U.S.C.A. 7th Circuit, 1987).

4. The purpose of punitive damages in Illinois is stated in *HAZELWOOD vs. ILLINOIS CENTRAL GULF RAILROAD*, 114 III App 3d 703, 712 (4th Dist. 1983) as follows:

> "Today, the nature of punitive damages in Illinois is clearly singular-it is *punishment* for the defendant. *(Kelsay.)* That punishment is designed in turn to promote three purposes: (1) to act as retribution against the defendant; (2) to deter the defendant from committing similar wrongs in the future; and (3) to deter others from similar conduct. (Kelsay; Mattyasovszky.) ..."

5. In *HAZELWOOD vs. ILLINOIS GULF RAILROAD, supra*, the Appellate Court discusses the three factors to consider in awarding punitive damages:

   1. The nature and the enormity of the wrong;

   2. The financial status of the Defendant, and

   3. The potential liability of the Defendant.

6. Considering the evidence in this case, the Court believes that punitive damages should be awarded to deter the Defendant and others from similar conduct in the future. Specifically, the

Court is referring to the conduct delineated by the Appellate Court on pages 722 and 723 of *LOWE II*,

7. The amount of actual damages established by the evidence in the case is small, $4;680, but there is evidence that the Plaintiff has incurred substantial attorney's fees and expenses in this protracted litigation. In an affidavit from Marshall Lowe dated August 13, 2003, Marshall Lowe stated that the Lowe Excavating Company had actually paid $225,925.83 in attorney's fees and expenses that further fees and expenses had been incurred, but not yet paid. Marshall Lowe's affidavit stated the last payment made towards attorney's fees and expenses was in April of 2003.

8. Additionally there has been an affidavit submitted by Attorney Gerard C. Smetana dated August 13, 2003 and Attorney Michael E. Avakian dated August 14, 2003 which reflect time records of billable hours and attorney fee hourly rate showing $304,101.62 and $194,350.00 respectively for these two attorneys. According to the .affidavit of Attorney Avakian, the $194,350.00 in attorney's fees plus expenses were not paid by the Plaintiff, but were incurred by an entity identified as "the Center on National Labor Policy, Inc." which entity is not a party to this lawsuit.: There is no indication that the Plaintiff is responsible for payment of the $194,350.00 in attorney's fees plus expenses.

9. While the Court is considering Plaintiffs attorney's fees as directed by the Appellate Court, this Court is not awarding attorney's fees, but is considering Plaintiff's attorney's fees as a factor in the assessing of punitive damages.

10. As pointed out by the Plaintiff, the Defendant has stipulated that it can pay any amount of punitive damages, if punitive damages were awarded as assessed by the trail [sic] court. In doing so, the Court understands the Defendant was not conceding that punitive damages should be awarded.

11. Considering the small amount of actual damages awarded to the Plaintiff, the additional harm to the Plaintiff caused by the Defendant's actions which caused the Plaintiff to be involved in years of protracted litigation and to expend a substantial amount for attorney's fees, and the need to deter the Defendant and others from engaging in the same conduct in the future, the Court finds that a reasonable award of punitive damages in the amount of $325,000.00.

THEREFORE, IT IS ORDERED THAT:

1. Plaintiff s Offer of Proof is denied;

2. Local 150's Motion to Strike Plaintiffs Motion for Punitive Damages is denied;

3. That judgment is entered in favor of the Plaintiff, Lowe Excavating Company against Defendant, International Union of Operating

Engineers, Local 150 for punitive damages in the amount of$325,000 .00.

ENTERED January 12, 2004

ENTER /s/ Michael J. Sullivan
MICHAEL J. SULLIVAN

CIRCUIT JUDGE

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VERNON W. KAYS, JR.
CLERK OF THE CIRCUIT COURT

CIRCUIT COURT
FOR THE 19TH JUDICIAL CIRCUIT

GEN. NO. 88-CH-34

STATE OF ILLINOIS } SS
COUNTY OF MCHENRY }

☐ Jury ☑ Non-Jury

ORDER

This cause came on to be heard on the Motion For Partial Reconsideration and Modification of Order on Punitive Damages filed by Plaintiff. The Court having heard the arguments of counsel and in the record, finds that for the reasons set forth in open court, the Plaintiff's Motion is granted in part and the amount of punitive damages awarded to plaintiff is hereby increased by $200,000.00 to $535,000.00.

Prepared by: Michael E., Avakian
Attorney for: Plaintiff
Attorney Registration No.: _____

Judge /s/ Michael J. Sullivan

STATE OF ILLINOIS)
) SS.
COUNTY OF MCHENRY)

IN THE CIRCUIT COURT FOR THE
NINETEENTH JUDICIAL CIRCUIT
MC HENRY COUNTY, ILLINOIS

LOWE EXCAVATING, INC.)
)
vs.)88 CH 34
)
INTERNATIONAL UNION OF))
OPERATING ENGINEERS,)
LOCAL 150)

ELECTRONIC RECORDING

REPORT OF PROCEEDINGS had at the hearing of the above entitled cause, before the Honorable MICHAEL J. SULLIVAN, Judge of said Court, on the 24th day of February, 2004.

APPEARANCES:

MR. GERARD SMETANA
Attorney at Law
Appearing on Behalf of the Plaintiff

MR. MICHAEL AVAKIAN
Attorney at Law
Appearing on Behalf of the Plaintiff

MR. DALE PIERSON

Attorney at Law
Appearing on Behalf of the Defendant

THE COURT: 88 CH 34, Lowe v. International Union.

VOICE: Good morning, your Honor.

THE COURT: Are we going to have a hearing this morning?

VOICE: We're ready if you are,

THE COURT: No. I'm going to pass it if we are. I'm not going to take it right this minute.

VOICE: We'll have some argument, I guess. A little bit.

VOICE: Yeah, I think a little bit of argument.

THE COURT: All right.

VOICE: Well, actually, your Honor, I would –
My position is there's no basis offered here for reconsideration, but if the Court was going to reconsider, I would want to file a brief.

THE COURT: I will reconsider.

VOICE: Can I file a response then, your Honor?

VOICE: I think maybe there isn't that much – -
Well, certainly, I can't stop him from filing a response, but it seems to me, your Honor, we're so familiar with the case, and he's already filed a notice of appeal, that we would just be delaying this further, but it's your

choice here now.

THE COURT: Why don't we pass it for a minute.

VOICE: Very good. Thank you, your Honor.

VOICE: Yeah, okay. Thank you,. Your Honor.

(Whereupon, there was a brief recess of the proceedings, and then resuming in open court.)

THE COURT: 88 CH 34.
Again, for purposes of the record, would you identify yourselves?

MR. AVAKIAN: Michael Avakian for Plaintiff, Lowe.

MR. SMETANA: And Gerard Smetana, S-m-e-t-a-n-a, for Plaintiff, Lowe Excavating Co.

MR. PIERSON: Your Honor, I'm Dale Pierson on behalf of Local 150 of the Operating Engineers, Defendant.

THE COURT: All right.

We are here, to my knowledge, on a motion filed —— It looks like it was filed January 20, 2004, Plaintiff's motion for partial reconsideration and modification of order on punitive damages filed on behalf of Lowe by Mr. Avakian.

MR. AVAKIAN: That's correct, your Honor.

THE COURT: All right. That is the only motion to

reconsider that was filed.

I see there were a couple notices of appeal and cross appeal, or how ever they were termed, but the only motion for reconsideration was this motion, and it --

The Court on January 12th entered an order on punitive damages, and in part of the order -- I think was on page four, paragraph eight, the Court assessed the various affidavits by Attorney Smetana and Attorney Avakian, and noted that again the affidavit of Attorney Avakian indicated there was one hundred ninety-four thousand three hundred fifty dollars in attorney's fees, plus expenses, but that the affidavit indicated that they weren't paid by the Plaintiff. They were paid by another party or incurred by another party, I believe is what the term -- the Center on National Labor Policy, Inc.

And the issue was -- It wasn't really addressed by the parties. The issue that the -- that is not the question as to the -- the fact that Mr. --- or that Attorney Avakian did the work or the reasonableness of the fees were not really an issue.

The issue that struck the Court is that we're not dealing with attorney's fees per se. We're dealing with punitive damages.

The case law all talks about one of the factors that you look at are Plaintiff's damages, Plaintiff's attorney's fees, and if they were not incurred by the Plaintiff, are they the Plaintiff's attorneys fees, and that is the issue that I raised I guess on my own. I don't think it was addressed by anyone.

But it's a substantial amount of money, and I looked at the cases to see what I could find. I couldn't find anything. All they talk about is, you know, Plaintiff's attorney's fees.

I understand that the time was put in. The services were provided.

And the issue -- and there is no –

From the Court's standpoint, there is no issue as to whether they were or whether they justified -- they justified time and expenses. The question in my mind in determining punitive damages is whether they were something that the Court could consider, and that is why I raised this, not -- not in terms of -- and so --

You know, since I guess the Court is the one who has determined this, this is really what I'm looking at in terms of going off on, you know, either side on some issue, and I did see your motion to reconsider, and you know, I don't know –

Given that, I mean if there is anything that either side wishes to say today, or if you still --

MR. AVAKIAN: Your Honor, yes. Just on the main point, I certainly understand what your sense of looking at the law is, but from our perspective one of the things that the Appellate Court did was indicate that the measure -- a measure of punitive -- or punitive damages can be measured by what the amount of attorney's fees might have been.

A rule that --

And it was sua sponte on your Honor's part to bring up this question about whether my attorney's fees should be part of what that measure might – what the Court might look at, but it wasn't raised by the defendants on any of their briefs or in oral argument, and if they had, we could have addressed it, but I think the point was it was not worth their effort to try to make because the U.S. Supreme Court, and I mentioned In Re: Primus, and there are two other cases that are really relevant, Blum versus Stenson, 465 U.S.

886, 1984, by the U.S. Supreme Court that legal foundations and attorney's fees are compensable, and that was a Civil Rights Acts case, but it indicates that just because a person is pro bono does not mean their attorney's fees are not compensable.

And also Johnson versus Lafayette Firefighters, Local 472, out of the Seventh Circuit, 1995, 51 App.3d 726, and the point there is simply that the attorney's fees -- the opposing side, the defendant in the case, doesn't take advantage of the fact that somebody had to pay for attorney's fees, and that the public interest encourages representation.

I think the -- and so for --

And so in determining whether or not fees should be awarded, normally the Court would definitely say, yes, a pro bono attorney should be entitled to his fees.

Now, we turn to what is the measure, which is the ultimate measure that your Honor resolved, and I think the point being what is necessary for deterrence, and you indicated it in the last paragraph of your order, which is what is the amount needed to deter.

Well, in this particular case, I don't think this case would have been brought without less than two attorneys. The Defendant had three, four, five, six different attorneys throughout the entire period, but essentially what your Honor would be indicating to the public is that the Plaintiff might have to pocket or assume more fees than he's ever going to be compensated for in order to bring this type of case, and I don't think that~s the appropriate measure.

Maybe your Honor didn't think of it in those terms, and I apologize for not bringing it up earlier, but because it hadn't been contested, we hadn't had an opportunity to argue it before.

So, in terms of what it would have took, it really took over five hundred thousand dollars to prevail in this case.

And the second part of the motion deals with the time value of the money lost, and that is a different question that your Honor had the right to make some judgments on based upon your look at the Appellate Court's directives, but we also think that should have been considered because Mr. Lowe certainly did spend two hundred thousand dollars of his own -- or Lowe Excavating spent two hundred thousand dollars of its own money, which over the years in this case which would have -- at least that amount would have doubled in value.

Therefore, I think we believe our motion for reconsideration is valid, and we ask that your Honor reconsider the measure -- the tool that you used to measure the punitive damages and to consider the additional one hundred ninety-four thousand three hundred fifty in attorney's fees.

MR. SMETANA: And may I just briefly so he doesn't have to respond twice, your Honor,

Briefly, if your Honor perhaps will recall, and I'm sure Mr. Pierson will, I spent most of my argument, opening the argument talking about the bed bug case which was the case in the Seventh Circuit which had been decided, and at that time there was five thousand dollars actual compensatory damages for a number of -- two or three persons at the most, and yet the Court in the Seventh Circuit there awarded -- affirmed a Cook County award of three hundred seventy-two thousand in punitive damages, remarkably close to the numbers that your Honor has come up with.

But interestingly there, your Honor, there was

no issue of the amount of attorney's fees. Attorney's fees was simply one item discussed in arriving at the punitives. The amount was really what would deter a hotel in the future of being more careful in terms of how it treated its customers in terms of bed bugs.

I suggest here that that is something your Honor just hadn't considered, not only the bed bug case itself which we cited, but more importantly, the fact that the attorney's fees that we -- that we alleged and that we charged -- the rates that we charged are fairly typical, and I have seen some rates that Local 150 has charged in other cases because we litigate a lot with them, and they're about the same. Our rates are not any different than theirs, and so if that's considered, I have to assume that they incurred roughly on their side about the same in fees.

And so simply shifting -- making them pay twice what the union determined for fifteen or eighteen years to litigate this case, that's not really a deterrence. It does have something to do with recompensing us for out-of-pocket, but that I don't think is a deterrence. If they're prepared to spend that kind of money on what they consider a matter of principle, and we, of course, as well, it's got to be something more, it seems to me, however you arrive at it.

And that was the only other thing I wanted to say, consistent with what Judge Posner in the Seventh Circuit did in the bed bug case.

MR. PIERSON: The lawyers aren't the Plaintiff, though, Judge, and I think the Court recognized that. The Appellate Court specifically said you are supposed to look at attorney's fees in measuring punitive damages, and I think the Court's comments are perfectly consistent with that direction from the

Appellate Court.

Attorney's fees are not awarded in tort cases. So, all the case law that talks about why you are supposed to get fees or why pro bono organizations are supposed to get fees to act as private Attorneys General and the like is irrelevant.

I mean in the law that allows for fee shifting, congress, or the legislature, or the courts have made a specific determination that it's appropriate to encourage plaintiffs who might not otherwise have the wherewithal to bring these cases.

That's not the case here. Plaintiff Lowe obviously had the wherewithal and was able to spend in excess of two hundred thousand dollars. That was his damages.

If the Court is going to look at what his damages were, that is, to compensate him for the wrong found by the Appellate Court, then that's the amount that is appropriate, and in assessing punitive damages that's what the case law all says, and it has consistently said. You are supposed to have some kind of relationship to the actual losses.

So, the actual losses to the Plaintiff were to pay the fees that he paid. So, it's perfectly appropriate not to look at anything but what Mr. Lowe actually did pay.

On the other point, I think the Court has already made a ruling on the prejudgment interest question with respect to the actual award itself, pointing out that you don't get prejudgment interest in tort claims. It's more of a feature of a contract claim.

I think that reasoning is perfectly appropriate with respect to what Plaintiff claims now. So, I don't think there is a basis to reconsider it. I think this was hashed out previously, but to the extent the Court does reconsider it, I don't think there has been any

persuasive argument made for why any change should be made in the punitive damage award.

Thank you.

THE COURT: Mr. Avakian.

MR. AVAKIAN: Yes. I'll address primarily what the last part that Mr. Pierson indicated because I think – I don't think the prior part is really the issue -- is the key difference between the two of us.

We do disagree that – whether or not it should be considered, but we believe that, you know, the deterrence factor requires that the additional attorney's fees that were required to litigate this case should have been considered.

With respect to the prejudgment interest, it wasn't prejudgment interest really that we were looking for. We have the actual lost time value of money.

The question is Mr. Lowe -- or rather Lowe Excavating expended two hundred thousand dollars mostly in the years 1988 and 1989, and sums throughout the period, but those -- the lost money they actually spent is part of that consideration that the Court should use to measure the punitive damages or -- and which is the amount that is necessary for deterrence.

I do note that in our original affidavits and reprinted on the back of the last page of this motion, it certainly shows that, for instance, Mr. Smetana's attorney's fees which were three hundred ten thousand dollars plus, with interest, would be seven hundred thousand.

It's clear that over the period of time which these amounts were expended or the fees were incurred, that the time value of money was essentially a

doubling of that amount.

Well, my point is that if it's the ultimate deterrence that the Court is issuing punitive damages on, its got to incorporate into that standard the value of the efforts and the current -- and the repayment so that potential plaintiffs in the future here in Illinois are encouraged to bring these types of claims, so that they know that, for instance, in this particular case, if you are facing sixteen years plus of litigation with Local 150, that at the end of the sixteen years, you are not further behind than you were before.

You may have recaptured finally your reputation, but the additional impact to you which is the cost that you have incurred in that, and in not every case is a pro bono attorney going to be available to appoint to a potential liable plaintiff in ILLINOIS, and I think your Honor needs to take that into consideration.

Thank you.

VOICE: I will say nothing further (inaudible)

THE COURT: With regard to the --

Going somewhat in reverse, the question as to the -- I guess, the --

Aside from the issue of – specifically of the fees imposed or claimed for work done by Attorney Avakian, aside from that, the question as to whether or not the --

In part two of the motion, considering the time value of the attorney's fees, and the other matters, the Court, in fact, did consider that, and the Court again felt that the -- believes that there is nothing in Illinois law that would indicate – That is something in the Court's discretion. I did not consider that. I was

determining what I believed would be a deterrence. I wasn't -- And a reasonable amount to do that.

In the bed bug case and the various other cases like this, you are dealing with small amounts of damages. In this case, as a matter of fact, the damages – actual damages were small. The attorney's fees were large. The question is that of proportionality.

Counsel for Plaintiff and Counsel -- you know, are seeking substantially more than that. I understand that, I appreciate that. I understand your argument.

The Court did not believe that would be appropriate or reasonable under the circumstances. The award of punitive damages given by the Court in the amount of three hundred twenty-five thousand dollars is a substantial amount of money.

I appreciate your argument that it's not enough, but it is a substantial amount of money and the Court deemed that.

The Court did consider your arguments about the Motel 6 or 8, whatever it is, the bug bed case, and the other matters in determining measures of damages.

In terms of the attorney's fees, there is no doubt in the Court's mind that on behalf of Mr. Lowe, Attorney Avakian did provide valuable services for Lowe. That was never an issue that I was dealing with. The question was whether you could consider this as a measure of damages.

The Court on reconsideration will modify its previous order and increase the award to five hundred and twenty-five thousand, over objection.

MR. AVAKIAN: Thank you, your Honor.

MR. SMETANA: Thank you, your Honor.

MR. PIERSON: Your Honor, I'm going to brief this issue, Well, IV11 file our motion. Thank you.

THE COURT: Fine.

MR. AVAKIAN: Thank you, your Honor.

MR. SMETANA: Thank you, your Honor.

WHICH WAS AND IS ALL OF THE EVIDENCE OFFERED AT THE HEARING OF SAID CAUSE.*